COMPENDIUM OF GRIEVANCE ARBITRATION DECISIONS 1986

Nova Scotia

Department of Labour

Research Division

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1986

NOVA SCOTIA DEPARTMENT OF LABOUR
RESEARCH DIVISION

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FOREWARD

This publication is the eighth summary of grievance arbitration decisions (awards) produced by the Nova Scotia Department of Labour. The decisions listed are those which have been filed in accordance with amendments to the Trade Union Act effective May 1978. On occasion summaries of arbitrations outside the jurisdiction of the Act have been included. They are by no means representative of all arbitration cases outside the jurisdiction of the Nova Scotia Trade Union Act and have been included as a matter of general interest.

Appeals of arbitration decisions made to the Supreme Court of Nova Scotia do not necessarily get filed with the Nova Scotia Department of Labour. Results of appealed decisions are received on an ad hoc basis and are reported as they arrive.

Part 1 of this publication lists grievance arbitration awards by decision number. All indices are retrospective to include the years 1978 through 1986. For summaries of decisions previous to 1986 it is necessary to refer to the appropriate issue for that year. Indexation of arbitration awards is based on Canadian Labour Arbitration by Donald J. M. Brown and David M. Beatty (Agincourt: Canada Law Book Co., 2nd ed., 1984).

Copies of decisions will be made available to interested parties upon request and will be subject to a nominal charge for reproduction. Inquiries relating to the enclosed can be directed to the Nova Scotia Department of Labour, Research Division, Library, P. O. Box 697, Halifax, Nova Scotia, B3J 2T8 (Phone: 424-4313).

Jean Dobson
Director

Research Division
Nova Scotia Department of Labour
Halifax, Nova Scotia
1988

DECISION: 86-01

Cape Breton Hospital AND Nova Scotia Nurses' Union

Judge J. A. MacLellan, Arbitrator

David Reynolds, for the union
Phil Veinot, for the employer
January 2, 1986

ISSUES: Discipline and Discharge: Burden of Proof 7:2300, Prior Record 7:4314; Disciplinary Penalties: Mitigating Factors-Rehabilitative Potential 7:4422, Reasonableness 7:4314, Type of Penalty - Warning 7:3542.

CIRCUMSTANCES: A severe letter of reprimand from her supervisor charged the grievor with: 1) declining performance, 2) a poor attitude to supervisors, and 3) to other departments, 4) abrupt mannerisms, 5) a poor attitude to persons, and 6) to patients' families. The grievor claimed a violation of the collective agreement clause that gave her the right to see and rebut a written evaluation, before the reprimand was recorded. She asked that the letter be withdrawn, and that each charge be separately evaluated.

The charges stemmed from an incident with a patient's son. The man was upset with a hospital psychiatrist's delay in sending his mother to the Nova Scotia Hospital where she would be treated as on previous occasions. Entering midway in the conversation, the head nurse on duty formed the opinion that the grievor lacked empathy and had not tried to alleviate his distress. Her report to the supervisor (together with previous incidents) was the basis of the reprimand.

AWARD: The grievance succeeds. Other witnesses and the prior record showed insufficient basis for the reprimand. A second nurse on duty stated that the man was already angry and that the grievor herself did nothing to offend, in describing hospital routine and saying that since there was no guarantee the psychiatrist would see him, he should have phoned first. This witness stated that the grievor confessed her own sympathy with the man and felt he deserved more answers from the psychiatrist.

Two prior verbal warnings by the supervisor were based on hearsay, the arbitrator found, without giving the grievor enough details of place or time to rebut. An attendant who witnessed the second incident denied any misbehaviour by the grievor. Past written evaluations showed that the grievor, when told to correct her "blunt mannerisms", had showed marked improvement.

DECISION: 86-02

Nova Scotia Power Commission **AND** International Brotherhood of Electrical Workers, Local 1928
Judge J. A. MacLellan, Arbitrator

John MacPherson, for the union
Gregory I. North, for the employer
January 2, 1986

ISSUES: Company Rules 4:1500; Interpretation: Intention of the Parties 4:2100; Overtime: Defining Overtime - Daily Overtime 8:2110, Premiums: Pyramiding 8:2140; Past Practice 3:4430.

CIRCUMSTANCES: Shiftworkers grieved the company's recent refusal to grant one hour's extra pay for mealtime to those who worked 60 minutes past the end of their normal shift. They did receive a meal chit. Top management was trying to impose a "uniform" interpretation for all parts of the company, allowing extra pay only when 61 or more minutes were worked. However, company documents showed that past practice in several plants had been to provide both meal allowance and pay as soon as 60 minutes were reached.

AWARD: The grievance was upheld, and the extra hour's pay awarded, on the basis of testimony and documents showing past practice in that plant.

DECISION: 86-03

Nova Scotia Civil Service Commission **AND** Nova Scotia Government Employees Union

S. Bruce Outhouse, Arbitrator

Ronald A. Pink, for the union
William M. Wilson, for the employer
January 3, 1986

ISSUES: Delay 2:3210; Discipline and Discharge: Grounds for- Work Performance - Carelessness 7:3520, Prior Record 7:4314; Disciplinary Penalties: Arbitral Review - Scope 7:4100, Reasonableness 7:4300.

CIRCUMSTANCES: The grievor, a Public Health inspector of on-site sewage systems, allowed improper design at a church camp. The system failed, and six months later the Department had to compensate the owner for several thousand dollars in reconstruction costs. A subsequent head office inquiry reported that the contractors were following a hasty sketch provided by

the Regional Engineer, and additional explanations by the grievor; that it was general policy, though not in writing, that any sewage system larger than a duplex be worked on jointly by the Engineer in all phases of construction; that the Inspector and his immediate supervisor were negligent in not seeking the engineer's advice; and that any Inspector should have recognized that a system with weeping tiles above grade must fail. Thereupon the Supervisor was suspended for one week, and the grievor for two weeks without pay, based on grievor's previous laxity and a prior two-week suspension for laxity. The union alleged that the grievor had been suspended without just cause, in violation of the collective agreement. The employer cited the inquiry's finding of negligence.

AWARD: The grievance succeeds in part, with restitution of lost pay, and a strong written reprimand to be substituted for the suspension. On detailed examination of the evidence, the arbitrator found serious negligence by the grievor, mitigated by the absence of written Departmental policy and failure of his superiors. Both failed to check the correspondence file in which the Engineer asked to be contacted. With evidence of carelessness but not wilful refusal, the grievor would normally deserve a 3-5 day suspension as in other arbitration cases, but this must be reduced in view of the employer's undue and unreasonable delay.

AUTHORITIES: Civil Service Collective Bargaining Act, S.N.S., 1978 c.3; Re Corporation of the Borough of North York and Canadian Union of Public Employees, Local 373 (1979), 20 L.A.C. (2d) 289 (Schiff); Re Brunswick Bottling Limited and Retail Wholesale and Department Store Union, Local 1065 (1984), 16 L.A.C. (3d) 249 (Iwanicki); Re Nova Scotia Government Employees Union on behalf of Joseph Gerald MacLellan and Civil Service Commission (May 6, 1983), unreported (Darby); Re Canadian Paperworkers Union, Local 583 on behalf of David Weadon and Minas Basin Pulp and Power Company Limited (May 23, 1985, unreported (Outhouse); Re Wardair Canada Inc. and Canadian Airline Flight Attendants' Association (1985), 19 L.A.C. (3d) 99 (Chertkow); Re Reimer Express Lines Ltd. and Teamsters Union, Local 880 (1958), 8 L.A.C. 341 (Schwenger).

DECISION: 86-04

Nova Scotia Power Corporation AND International Brotherhood of Electrical Workers, Local 1928

Bruce Outhouse, Arbitrator

John MacPherson, for the union

George Mitchell, for the employer
January 7, 1986

ISSUES: Interpretation: Intention of the Parties 4:2100; Lead Hand: Vacancy 5:2510; Vacancy 5:2510.

CIRCUMSTANCES: This was a policy grievance. The union claimed that the collective agreement required the company to provide a substitute whenever a regular lead hand was absent more than a day, subject to the condition that there was no permanent change in organization. It argued that the condition allowed the employer the right to eliminate such a position permanently. Normally, a crew member would assume the position and pay during the lead hand's absence. No back pay was demanded in this case.

The employer admitted that it had failed to appoint a substitute for a three-day absentee, but denied any obligation to do so. It argued the purpose of the conditional clause was to ensure the normal degree of supervision, and that this discretion was within management rights. It argued that the condition "no permanent organization change" was inserted to require a substitute only if there was a temporary organization change.

AWARD: The grievance succeeds. The employer's interpretation stretched the natural meaning of the clause too far, and contradicted past practice. The condition was clear and unambiguous. The arbitrator declared that the principle would apply equally to leading hands or foremen.

AUTHORITIES: Trade Union Act, S.N.S. 1972 c.19 as amended.

DECISION: 86-05

National Gypsum (Canada) Limited AND International Union of Operating Engineers, Local 721B

Judge J. A. MacLellan, Arbitrator

Edgar Doull, for the union
Gregory I. North, for the employer
January 10, 1986

ISSUES: Skill and Ability 6:3000, Arbitral Review - Senior Employee if Relatively Equal 6:3210, Criteria of Ability and Qualifications 6:3300.

CIRCUMSTANCES: Of two men who applied for a bulldozer operator/diesel mechanic job, the one with 21 years' experience in the company, plus another 10 years in the construction industry won the position. The second man, who had more

seniority in the particular bargaining unit, viz. 2.5 years plus 10 years in construction, grieved.

AWARD: The grievance fails. A contest between competing applicants is decided by seniority only when their skills and abilities are relatively equal. Where the company's bona fides are not in question, the grievor bears the burden of proof. Evidence at the inquiry satisfied the arbitrator that the applicants' abilities and skills were not similar.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration, at page 297ff.

DECISION: 86-06

Crossley Karastan Carpet Mills Ltd. AND Canadian Brotherhood of Railway, Transport and General Workers, Local 612

Peter E. Darby, Arbitrator

E. A. (Ted) Powell, for the union
Donald W. Rough, for the employer
January 13, 1986

ISSUES: Overtime: Equitable Distribution 5:3224, Management Rights 5:3220, Remedies 2:1423, 5:3240.

CIRCUMSTANCES: The chance to work overtime on a Saturday and Sunday was offered to the grievor and other members of his department. The grievor was unable to work both days but was willing to work on the Sunday. The supervisor refused to allow him to work only one of the days. The employer states that there is nothing in the agreement which stops them from offering the overtime as a package deal. The union claim that overtime provisions are primarily for the benefit of the employees and the company did not act reasonably in its assignment of overtime. The claims is also made that the company was originally willing to settle the grievance by giving the grievor the next shift available, thereby admitting the right of the grievor to the overtime.

AWARD: The grievance is denied. The employer has the right to determine the duration of overtime shifts since there is nothing in the agreement which sets a minimum or maximum duration to overtime. In this situation where payment for the Saturday is less than the overtime pay for the Sunday offering the two days together allows an equitable distribution of the overtime. Any other method would most likely result in everyone wanting to work Sunday but not Saturday.

The arbitrator has also been asked to propose a remedy in the

event that this situation should arise again. The union is seeking remedy in form of payment and the employer wants remedy in kind.

The arbitrator rules that remedy must be in form of payment. By offering the employee the next opportunity for overtime the possibility of interfering with the rights of other employees might arise.

AUTHORITIES: Re United Automobile Workers and Canadian Motor Lamp Co. Ltd. (1967), 18 L.A.C. 250 (O'Shea); Re Gulf Oil Canada Ltd. and Oil, Chemical and Atomic Workers, Local 9-593 (1974), 5 L.A.C. (2d) 187 (Layner); Brown and Beatty, Canadian Labour Arbitration, 1984 p.150, 259, 260; Nova Scotia Nurses Union (Fleet) and Dartmouth General Hospital and Community Centre (November 30, 1984) (Darby); KVP Co. Ltd. (1965), 16 L.A.C. 73 (Robinson); Re Crossley Karastan Carpet Mills Ltd. and Canadian Union of Railway, Transport and General Workers, Local 612 (1979), 22 L.A.C. (2d) (MacDougall); Palmer, E. E. Collective Agreement Arbitrator in Canada (2nd ed. 1983, Butterworths) p.53, 641-2; Re Canadian Johns-Manville (1971), 22 L.A.C. 396; Re Rothmans of Pall Mall Canada Ltd. and Tobacco Workers International Union, Local 319 (1974), 8 L.A.C. (2d) 61; Crossley Karastan Carpet Mills Ltd. and C.B.R.T. and G. W., Local 612 (June 14, 1984) (MacLellan) (unreported); Trade Union Act, S.N.S. 1972, c.19, sec. 1, 2(a).

DECISION: 86-07

Texaco Canada Inc. AND Atlantic Oil Workers, Local 1

Bruce Outhouse, Chairman; John D'Orsay; Gregory North

Ron Stocton, for the union
John Merrick, for the employer
January 13, 1986

ISSUES: Interpretation: Definitions 4:2100, Intention of the Parties 4:2100, Aids to Interpretation - Prior Agreements 4:2240; Statutory Holidays: Qualifying Days - Illness 8:3123.

CIRCUMSTANCES: The grievor was scheduled to work April 3, 4, 5, 6. He was ill and was only able to work on the 3rd. He received full wages for his three days of sick leave but was not given holiday pay for April 5, Good Friday. According to the union the collective agreement gives the employer the discretion to pay holiday pay in this case and the grievor was not treated fairly when he was denied the pay. The employer interprets the agreement to mean that if an employee does not work a scheduled shift due to illness then he is automatically denied the privilege of holiday pay. Discretion only applies for reasons

other than sickness or injury.

AWARD: The grievance is allowed based on the conclusion that the intention of the relevant clause was that employees would not automatically forfeit holiday pay because of sickness or injury. This becomes clear from looking at the history of the clause in past agreements. The employer is required to act reasonably and adopting a blanket policy denying holiday pay, which was done in January 1984, means that each case is not being examined individually and fairly. The grievor's claim is to be remitted to the employer for its consideration.

DISSENT (Dorsey): While agreeing with the ultimate award, Mr. Dorsey disagrees with the reasoning upon which the majority's conclusion was based. The argument hinges on the ambiguity of the word 'except' in the clause. Mr. Dorsey maintains that the rules of grammar applied correctly allow you to read the clause and still arrive at the majority's final decision.

DECISION: 86-08

Sydney Steel Corporation AND United Steelworkers of America, Local 1064

J. A. MacLellan, Arbitrator

Ben O'Neil, for the union
Gregory I. North, for the employer
Equal 6:3220, Burden of Proof 6:3200, 3:2412.

CIRCUMSTANCES: A job advertisement for a steel fabricator (boiler maker) was posted and there were four applicants. Since none of the applicants met the qualifications as posted the company decided to post a new job vacancy with different skill requirements. They wanted to find someone as knowledgeable as possible who could begin the job with a minimum of supervision. In this second round the grievor claims that he had more seniority than the successful applicant and by passing him over the company had violated the collective agreement. The union argues that the new posting required a training period and both men were equal in ability. Therefore the job should go to the more senior employee.

The company states that seniority was not a factor in their decision because the successful applicant had more skill and also, it was not their intent to have the employee undergo a lengthy training period.

AWARD: The grievance is dismissed. The evidence clearly shows that the grievor did not have as much work experience in related fields as did the successful applicant. The company assessed the applicants honestly and no ill will was directed toward the

grievor.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration, p. 297ff.

DECISION: 86-09

The Board of Management of the Grace Maternity Hospital **AND** Grace Maternity Hospital Local of the Nova Scotia Nurses Union

J. A.MacLellan, Chairman; Donald H. McDougall; Ronald Pink

David Reynolds, for the union
Eric Durnford, for the company
January 14, 1986

ISSUES: Interpretation: Context 4:2100, Reasonableness 4:2100; Wages: Increases - Progressive Wage 8:2320.

CIRCUMSTANCES: The collective agreement calls for automatic yearly increments to the salaries of all full-time and part-time nurses. The employer has been following the practice of applying the increments based on a standard 1,956 hours worked per year. The agreement does not provide a formula for the payment of increments in the case of part-time nurses and the employer has taken the position that 'yearly' should be defined in terms of performance and not as a time period. The union argues that the hospital should give the salary increment to all part-time nurses, regardless of how many hours worked in the year.

AWARD: The grievance is dismissed. Based on the fact that 'automatic yearly increments' can only make sense in this case if 'yearly' means a year of work performance and not employment status.

The general consensus in arbitration awards is that the words of the agreement are to be interpreted in light of their context and purpose. Salary increments are meant to reward increased skills with increased length of service. Any other interpretation would not be in keeping with the intent of the agreement.

DISSENT (Pink): The disagreement is with the interpretation of 'yearly' in other clauses in the agreement the parties have made the distinction clear. In interpreting the work 'yearly' differently in this case the majority is amending the terms of the agreement. Mr. Pink recommends that the grievance be dismissed and the matter be referred back to the parties with respect to implementing the award.

AUTHORITIES: Re Robertson Building Systems Ltd. Hamilton and International Association of Bridge, Structural and Ornamental

Iron Workers, Local 734, 19 L.A.C. (3d), 427.

DECISION: 86-10

The City of Sydney **AND** International Association of Firefighters, Local 2779

Charles O'Connell, Arbitrator

John MacCormack, for the union
M. G. Whalley, for the employer
January 16, 1986

ISSUE: Overtime: Burden of Proof 3:2417.

CIRCUMSTANCES: The grievor is claiming overtime for two extra days worked on his regular tour of duty (a regular tour being four shifts) as a result of being transferred from one platoon to the other.

AWARD: The grievance fails. According to the collective agreement employees must work in excess of three hundred and thirty-six hours over an eight week period to qualify for overtime. Looking at his work record for the period in question it is clear that the grievor did not work in excess of 336 hours. In such a grievance the onus of burden of proof lies with the grievor and he has not satisfactorily argued the case.

DECISION: 86-11:

Nova Scotia Power Corporation **AND** International Brotherhood of Electrical Workers, Local 1928

Innis Christie, Arbitrator

John MacPherson, for the union
Terry Roane, for the employer
January 24, 1986

ISSUES: Interpretation 4:2100; Travel Allowance 8:3700.

CIRCUMSTANCES: Both grievors were assigned a temporary work point of Truro instead of the usual Stewiacke. They are requesting travel expenses even though the new job site is closer to their homes.

The union argues that the collective agreement states that when employees are assigned to a temporary report point they are entitled to either of lodgings or travel expenses. The purpose of this is to compensate employees for any inconvenience.

The employer maintains that the clause to which the union refers is not meant to stand alone. The $24.00 per day travel expense will be paid in lieu of board when the situation arises where the employee may have to consider temporarily living near the job site. In this case the question of the two grievors needing lodgings does not arise and consequently, they are entitled to the travel expense.

Both counsel claim that the agreement is unclear and ambiguous. The union maintains that past practice supports its case.

AWARD: The grievance is dismissed. The arbitrator finds that the interpretation put forward by the employer is the most plausible. The agreement gives the employer the right to assign employees to a temporary report point and to provide board and lodging when necessary. Those who are entitled to board but who do not choose it should be paid travel expenses. The employer also must provide transportation but the agreement says nothing about travel expenses. The clause in question should be read in the context of the agreement.

DECISION: 86-12

Laurence Sweeney Fisheries Limited **AND** Canadian Brotherhood of Railway, Transport and General Workers, Local 611

Bruce Outhouse, Arbitrator

Ronald Pink, for the union
J. T. MacQuarrie, for the employer
January 30, 1986

ISSUES: Management Rights 4:2310; Wages - Management Rights 8:1400.

CIRCUMSTANCES: The union claims that the owner of a number of fishing vessels failed to pay the crew of one of them in accordance with the terms of the collective agreement. On this particular occasion the employer refused to pay the price for large scallops on the grounds that those caught were undersized. It had previously instituted a three-tier system for payment for varying sizes of scallops and payment was made in accordance with this new system. The payment schedule as set out in the collective agreement does not apply to undersized scallops.

The union maintains that the employer failed to prove the scallops were undersized, the employer did not pay the going rate and that, even if the scallops were undersized, the crew should not be penalized for the captain's actions, especially as he is management's representative.

AWARD: The grievance is dismissed. All evidence points to the fact that the scallops were undersized. The arbitrator finds that the price paid for the undersized scallops was fair. There is no provision in the agreement which stops the employer from using the three-tier payment system. In addition the arbitrator finds that the captain did not act in bad faith towards the crew and there is no basis for holding the employer accountable for the captain's conduct.

AUTHORITIES: Re Newfoundland Fishermen, Food & Allied Workers Union and Canso Seafoods Limited (February 10, 1984), unreported (Kelly).

DECISION: 86-13

Sobeys Stores Limited AND United Food & Commercial Workers Union, Local 1973

Bruce Outhouse, Arbitrator

Ronald Pink, for the union
Bruce MacIntosh, for the employer
February 11, 1986

ISSUES: Discipline and Discharge: Refusal to Obey Instructions - Work Overtime - Compulsory Overtime 7:3634; Disciplinary Penalties: Arbitral Review - Scope 7:4100, Substitution of Penalty 7:4000, Type of Penalty - Set by Collective Agreement 7:4100; Interpretation: Reasonableness 4:2100.

CIRCUMSTANCES: In this case the grievors were suspended for ten days each because of their refusal to work compulsory overtime. The employer claims that this action was a clear violation of the collective agreement and the proper disciplinary action was taken. Since this situation had never arisen before, suspension was chosen over dismissal. The union claims that the collective agreement does not apply in this case. The article in question provides for disciplinary action against those employees who leave without permission either during their regular shift or their overtime shift. The grievors left at the end of their regular shift and therefore, this clause does not apply to them. In any case, according to the union, the employer has waived the article's application since the specific penalty called for in the agreement, i.e. dismissal, was not followed.

The employer submits that the arbitrator is without jurisdiction to interfere with the penalty even if it is found to be excessive. The union argues that the arbitrator does have the jurisdiction to decide on the reasonableness of the penalty.

AWARD: The grievance fails. It is clear that the grievors left

work without permission during the assigned overtime. There is no gap between regular work and overtime. The specific penalty determined by the agreement was not exceeded by the employer and therefore, the arbitrator has no jurisdiction to interfere with the suspensions. The power of penalty substitution usually arises when the agreement does not provide a specific penalty.

AUTHORITIES: Re Corporation of the City of Nanaimo and Canadian Union of Public Employees, Local 401 (1981), 30 L.A.C. (2d) 304 (Larson); Re Humpty Dumpty Foods Ltd. and Retail, Wholesale, Bakery & Confectionery Workers' Union, Local 461 (1981), 3 L.A.C. (3d) 112 (Hinnegan); Hamilton Street Railway Company and Amalgamated Transit Union, Division 107 (1971), 22 D.L.R. (3d) 658 (Ont. H.C.J.); Valley-Rite Mix Limited v. Teamsters, Local Union 213 (1975), 1 W.W.R. 685 (B.C.C.A.); Brown and Beatty, Canadian Labour Arbitration (2nd ed.) p.461-462; Port Arthur Shipbuilding Company v. Arthurs et al. (1968), 70 D.R.L. (2d) 693 (S.C.C.); Trade Union Act, S.N.S. 1972, c.19.

DECISION: 86-14

Kent Homes Limited **AND** Labourers International Union of North America, Local 615

Bruce Outhouse, Chairman; Bruce MacDonald, Michael Bury

Ronald Pink, for the union
Gerald Lawson, for the employer
February 3, 1986

ISSUES: Interpretation: Intention of the Parties 4:2100; Evidence: Types of Evidence - Extrinsic Evidence - Past Practice 3:4430, Management Rights 4:2300; Management Rights - Work Assignment 5:0000; Past Practice 3:4430; Skill and Ability: Arbitral Review - Senior Employee with Required Ability 6:3210.

CIRCUMSTANCES: The grievor, a wall assembly lead hand, applied for the position of component lead hand. He was the second most senior person to apply. The successful applicant was junior but management claims he was the most qualified for the position. The grievor was capable of the position but he would need two to three weeks to familiarize himself with the job. The union argues that the collective agreement states that when a vacancy occurs in the bargaining unit then the senior employee is entitled to the position provided he has the required skills. Past practice of the employer supports the interpretation of seniority as playing a part in the selection process. The employer interprets the article differently claiming that the parties never intended seniority to play any role in the filling of vacancies. It violates the right of every employee to be considered provided they are qualified. Even if seniority is

found to play a role the Board should defer to management's assessment of the qualifications of the applicants.

AWARD: The grievance fails. Based on the context of the article in question the employer's interpretation is deemed most reasonable. The collective agreement gives the employer broad powers with respect to the filling of vacancies and these are subject only to the limitations that are defined in the agreement. In addition there is no evidence to show that there has been uniform past practice which would draw the conclusion towards the union's interpretation of the article.

DISSENT (MacDonald): According to Mr. MacDonald the intent of the article in question is clear even if the working is not. All things being equal seniority is meant to be the deciding factor in situations of layoffs, rehiring and job vacancies. The job should be awarded to the grievor effective the date of the arbitrator's decision.

DECISION: 86-15*

Civil Service Commission **AND** Nova Scotia Government Employees Union

S. Bruce Outhouse, Arbitrator

Ronald A. Pink, for the union
Reinhold M. Endres, for the employer
January 15, 1986

ISSUES: Job Classifications and Descriptions: Creation or Revision - Change of Work Load 5:2410, Creation or Revision 5:2000, 5:2440; Arbitrability: Agreement as Primary Source of Jurisdiction 2:1100.

CIRCUMSTANCES: The grievors, occupying the positions of Senior Team Leader, Team Leader and Unit Leader claim that the work they perform in these positions is work that bears a greater resemblance to the higher classification of Assistant Head Nurse than that of Staff Nurse. They are seeking compensation for time worked at the lower classification.

The employer claims that the position of Assistant Head Nurse no longer exists at the hospital and, therefore, no useful purpose can be served by comparing the role and duties of Team and Unit Leaders with it. The duties performed by the grievors legitimately fall within the level of Staff Nurse. Referring to the Civil Service Collective Bargaining Act, the employer claims that the arbitrator is without jurisdiction to remedy the situation in the event that the grievors are found to be incorrectly classified. The authority to do this lies with the

Commission alone.

AWARD: The grievance succeeds. The arbitrator finds that the grievors' jobs better fit the higher classification of Assistant Head Nurse than that of Staff Nurse classification. The classification of Assistant Head Nurse still remains in the collective agreement and even though the hospital considers it obsolete, it is a classification available to the grievors providing they prove that their current duties fall within its bounds.

With regards to this jurisdiction the arbitrator finds that classification is a legitimate subject of collective bargaining and adjudicators have full remedial authority to enforce agreements respecting it. The employer is directed to compensate the grievors accordingly.

AUTHORITIES: Re United Steelworkers and Dunham Bush (Canada) Ltd. (1969), 20 L.A.C. 419 (Weiler); Re Windsor Public Utilities Commission and International Brotherhood of Electrical Workers, Local 911 (1974), 7 L.A.C. (2d) 380 (Adams); Re Dominion Stores Limited and Retail, Wholesale and Department Store Union (1976), 13 L.A.C. (2d) 433 (Rayner); Re Health Labour Relations Association of British columbia (Cranbrook and District Hospital) and Hospital Employees Union, Local 180 (1984), 16 L.A.C. (3d) 303 (Germaine); Re Municipality of Metropolitan Toronto and Canadian Union of Public Employees, Local 43 (1984), 13 L.A.C. (3D) 248 (Swan); Re Nova Scotia Government Employees Union of behalf on Donald King and Craig Morgan and Civil Service Commission (June 27, 1983) unreported (Outhouse); Re Ontario Hydro and Canadian Union of Public Employees, Local 1000 (1983), 11 L.A.C. (3d) 404 (Shime); Re Nova Scotia Government Employees Union on behalf of Arthur Bennet and Civil Service Commission (January 22, 1982) unreported (Christie); Re Nova Scotia Government Employees Union on behalf of Donald King and Craig Morgan and Civil Service Commission (March 6, 1984) unreported (Outhouse); Re Westinghouse Canada Inc. and U.E.W., Local 549 (December 30, 1982), unreported (Swan); Re Nova Scotia Civil Service Commission and Nova Scotia Government Employees on behalf of Jean Ferguson (October 15, 1985), S.H. No. 51672; Civil Service Collective Bargaining Act, S.N.S., 1978, c.3; Civil Service Act, S.N.S. 1980, c.3.

*See appeal to Supreme Court: 86-52.

DECISION: 86-16*

The Cape Breton District School Board AND The Nova Scotia Teachers Union

Mr. Justice K. Peter Richard, Trial Division

Frederick P. Crooks, for the union
Charles Broderick, for the employer
December 16, 1985

ISSUES: Judicial Review: Remedies 1:5700.

CIRCUMSTANCES: This is a second application to the Supreme Court of Nova Scotia, Trial Division with respect to an earlier arbitration award.

A grievance was filed regarding the eligibility of the grievor for the service award when she retired. Question arose over the length of service since the grievor ceased employment for a one year period in 1959. The employer argued that this break made her previous years of employment ineligible for consideration of the service award. The arbitrator awarded in favour of the employer stating that the collective agreement implied that continuous consecutive service was necessary for calculation of the award.

The union applied for an order setting aside this award. The decision of that application was that the arbitrator had exceeded his jurisdiction by altering the collective agreement. The application was granted and the matter remitted to the arbitrator. The grievance was again dismissed by the arbitrator who held that rights cannot be carried forward to a second period of employment following a termination of employment.

A second application is now made by the union on the grounds that the second award did not comply with the judge's order.

AWARD: The application is dismissed. The judge finds that his court lacks the jurisdiction to review, alter or otherwise deal with one of its own orders once that order has been entered. The original order was not specific in telling the arbitrator to allow the grievance and, therefore, he cannot be said to have disobeyed the order. The appropriate procedure for the union is to apply for an order to quash and set aside the arbitrator's second award.

AUTHORITIES: Toronto v. Thompson (1932), 41 O.W.N. 341 (CA); Re International Woodworkers, Local 1217 and Industrial Mill Installations Limited (1972), 51 D.L.R. (3d) 318; Broom v. Pepall (1911), 23 D.L.R. 630; Boutilier et al. v. Traders General Insurance Co. (1968), 1 D.L.R. (3d) 379; Credit Foncier Franco-Canadien v. Fort Massey Realties Limited et al. (1981), 49 N.S.R. (2d) 646; Lunenburg v. Public Service Commission of Bridgewater (1983), 59 N.S.R. (2d) 23; Little v. Little (1980), 40 N.S.R. (2d) 83; R. v G. M. Holdings Ltd., (1941) 3 All E.R. 417; Friesen et al. v. Saskatchewan Mortgage and Trust Corp. et al., (1926) 4 D.L.R. 496; Arbitration Act, R.S.N.S., 1967 c.12; Judicature Act.

* Summaries of first court decision quashing original award and of second award may be found at 85-55 and 85-55A in the Compendium of Grievance Arbitration Decisions, 1985.

DECISION: 86-17*

G & M Sweeney Construction Ltd. and Komac Construction Limited AND United Mine Workers of America, District 26

George R. LeVatte, Arbitrator

Terry McVarish, for the union
Bernard Boudreau, for the employer
February 19, 1986

ISSUES: Remedies: Types of Remedy - Damages - Measure - Income Tax and Benefits 2:1416.

CIRCUMSTANCES: The arbitration arises from a difference between the employer and union over an award from a previous grievance. The employer was ordered to provide full redress for loss of income, pension rights, vacation pay and any rights to which the grievors were entitled within the stated time period.

The employer claims that the grievors should receive net pay less the amount they received from Unemployment Insurance while they were not working. The employer would retain this extra amount and it would become part of the company's assets. This is based on the interpretation that the award was similar to an award of damages in a civil law suit. The union claims that company should remit the money to the Unemployment Insurance Commission.
AWARD: The decision of the Board was not similar to an award in a civil law suit. The employer is required by law to remit any overpayment by Unemployment Insurance Commission to the Receiver General of Canada.

AUTHORITIES: Unemployment Insurance Act (1971), section 52(1); Acts of Canada, c.48, 1970-71-72.

* Original award in this matter is summarized at 85-105 in the Compendium of Grievance Arbitration Decisions, 1985.

DECISION: 86-18

Northside-Victoria District School Board AND Canadian Union of Public Employees, Local 981

David J. MacDonald, Arbitrator

Kevin MacNeil, for the union
David Ryan, for the employer

ISSUES: Management Rights 5:000; Working Hours and Shifts-Reduction of Hours 6:2210.

CIRCUMSTANCES: The grievors, caretaker/cleaners in the Northside-Victoria District School Board claim the employer violated the collective agreement when their working hours were reduced from six hours per day to four hours per day without the consent of the union. The union claims that the agreement provides for two groups of caretaker/cleaners, the difference being in the number of hours worked each day. Hours are decided at time of employment and can only be changed when agreement is reached on both sides.

The employer contends that there is only one category of caretaker/cleaners and the agreement states that they can work either six or four hours each day. By saying otherwise the union is reading too much into the agreement. The employer also maintains that hours of work do not constitute conditions of employment and therefore it has the power to act unilaterally without the consent of the union to change the hours.

AWARD: The grievance is dismissed. The arbitrator finds that the collective agreement allows the employer to alter the existing shifts of caretaker/cleaners to either a six hour or a four hour day. It says nothing of creating two separate categories of employees. The agreement clearly recognizes the right of management to direct its work force.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration, 2nd ed. p.247,248.

DECISION: 86-19

University College of Cape Breton AND Nova Scotia Government Employees Union, Local 18

David J. MacDonald, Chairman; Manning McIntyre; Frank Elman

Ronald A. Pink, for the union
J. Bernard Boudreau, for the employer

ISSUES: Discipline and Discharge: Grounds for - Absence from Work 7:3100, Failure to Notify Employer 7:3110, Just Cause-Other Standards 7:1300, Procedural Limitations on Discipline 7:2100; Picket Lines - Refusal to Cross 7:3640.

CIRCUMSTANCES: The grievor did not attend work on three days as a result of a personal decision not to cross a picket line that

had been formed at his work place. It was not his bargaining unit that was on strike. He was disciplined for his absence by a one-day suspension (the employer was only aware of one day he was away). Unfortunately he received notice of his suspension after it was to have taken place and consequently found himself in the position of having worked a day for which he had not been paid.

Other employees were similarly disciplined so the Board was asked to give some direction concerning its implication to them. The union claims the discipline was not just and there was not sufficient cause. Management maintains that it acted within its rights.

AWARD: The grievance succeeds. The collective agreement exhaustively covers situations under which an employee might apply for special leave, and not wanting to cross a picket line is not one of them. In addition, in all cases the leave must be requested prior to the day of absence. The Board does not have the jurisdiction to include a situation which is not specifically covered and it cannot change, modify or alter the collective agreement.

Clearly the employer had the right to discipline the employee and it was done in an appropriate manner. However, the employer violated the agreement since the written notice of the suspension did not reach the grievor within the two week notice period that is stipulated. Consequently the grievance is allowed on the basis of non-compliance by the employer. The grievor is to be reinstated and compensated for his loss of pay.

AUTHORITIES: Furness Withy & Co. Lt. and Maritime Employees Association (1974), 44 D.L.R. (3d) 758; Brown and Beatty, Canadian Labour Arbitration, 2nd ed. p353-354; International Longshoremen's Association, Local 273 and Maritime Employees Association (1974), 89 D.L.R. (3d) 289; International Brotherhood of Electrical Workers, Local 1030 and Maritime Telegraph and Telephone Company Limited (unreported); Re Mirador Motor Inns and Hotels, Clubs and Restaurants, Tavern Employees Union, Local 261, 2 L.A.C. (2d) 339; Re Labatt Ontario Breweries and National Brewery Workers Union, Local 1, 5 L.A.C. (3d) 32; Northern Electric Company Ltd. and Communications Workers of Canada, 7 L.A.C. (2d) 305.

DECISION: 86-20

The Canadian Salt Company AND Energy and Chemical Workers Union, Pugwash Salt, Local 823

R. Lorne MacDougall, Chairman; John K. Lynn; Raymond Hill

John F. Kane, for the union
Bruce T. MacIntosh, for the employer
February 20, 1986

ISSUES: Management Rights 4:2300; Jurisdiction: Sources-Collective Agreement 2:1200; Wages - Mode of Payment 8:1400.

CIRCUMSTANCES: The employer decided to change to one method of payment for all its employees as a result of a change in the computer system handling payroll. A choice between two methods of payment was given to the union which then polled its members. A slight majority opted for payment via direct bank deposit. This grievance arises from those employees who were still being paid by cheque and who did not want to change over to the new system. The union claims the employer has no right to alter methods of payment.

AWARD: The grievance is dismissed. The management rights provided for in the collective agreement are very broad and there is no explicit mention of the manner of payment to be followed by the employer. The board has no jurisdiction over matters not specifically covered in the collective agreement and it does not have the power to alter, modify or amend the agreement. The change to one method of payment of wages for all employees is consistent with valid business practice and the employer cannot be said to have acted in bad faith.

AUTHORITIES: Re United Steelworkers and Uddeholm Steels Limited (1971), 22 L.A.C. 419; Re Victoria Hospital Corporation and London and District Service Workers' Union, Local 220 (1982), 4 L.A.C. (3d) 193.

DECISION: 86-21

Nova Scotia Liquor Commission AND The Association of Commercial and Technical Employees, Local 1670

Bruce Outhouse, Arbitrator

Blaise MacDonald, for the union
James Leefe, for the employer
March 3, 1986

ISSUES: Jurisdiction: Ordering Particulars and Production of Evidence 3:1420; Particulars 3:1410.

CIRCUMSTANCES: The union, in the midst of arbitration hearings, learned of an existence of a report from Advisory Services of the company which had investigated the grievor and the incidents surrounding the grievance. It contained, among other things, a recommendation that the grievor be dismissed. The union wants

the report to be produced in its entirety for its counsel to examine. In addition, the union claims that, since the original demotion letter was not specific in outlining the employer's reasons for disciplining the grievor, they need the report to determine the original reason for the demotion.

The employer objects on the basis that the existence of the report is irrelevant to the case.

AWARD: The union succeeds. The arbitrator first established his authority to order the production of the report under the Trade Union Act and the Public Inquiries Act. Partial disclosure of the document is ordered. Relevant documentary evidence of a factual nature in the report should be made available to the union. Those parts that contain recommendations, analysis, second hand factual summaries, etc. are not to be disclosed. This is to protect the confidentiality of those persons who cooperate in providing information for these in-house reports. More importantly, while second-hand information analyses and the like may help the employer to determine the facts, the case must be build on factual information. No purpose is served by introducing this supplementary material.

The arbitrator also rules that the union could have compelled the employer to provide particulars regarding the discipline before the hearing and, even at this late date, it can do so via other more proper and reliable avenues than from inferences which could be drawn from the report. The employer is directed to provide the union with the factual information in the report.

AUTHORITIES: Canada Post Corporation and Canadian Union of Postal Workers (August 15, 1985) unreported (McKee); Trade Union Act, S.N.S., 1972, c.19; Public Inquiries Act, R.S.N.S. 1967, c.250, ss. 3 & 4.

DECISION: 86-22

University College of Cape Breton **AND** University and College Staff Union

Leo McIntyre, Chairman; Gilbert McIntyre; Frank Elman

Reeves Matheson, for the union
J. Bernard Boudreau, for the employer
February 11, 1986

ISSUES: Management Rights 4:2310; Skill and Ability: Arbitral Review - Senior Employee with Required Ability 6:3220; Promotion, Demotion and Transfer: Demotion or Transfer - Defined 6:2100; Promotion Defined 6:2100; Bargaining Unit: All Employee Unit 5:1100; Jurisdiction: Sources - Collective Agreement 2:1200.

CIRCUMSTANCES: The grievor was one of two applicants competing for the position of Library Clerk at the university. Approximately three weeks after submitting her application she received a letter stating that she was not the successful applicant. Both applicants were already employees of the library. The successful applicant had been temporarily working in the advertised position.

The grievor claims that the employer acted in bad faith in the appointment. The successful applicant was not a member of the Staff Union and the employer must hire from within the union first. In addition, all things being equal between the applicants, a fact that the employer freely acknowledged, the position should go to the most senior employee, in this case the grievor. The last argument made by the union is that the employer is bound by the agreement to make promotions from within the bargaining unit.

The employer states that the successful applicant was chosen because she knows the job well, had proven her ability and would not require training. The grievor, being a permanent employee of the university is within the bargaining unit and she is eligible for the position. In addition this job would represent a transfer for the grievor and not a promotion.

AWARD: The grievance fails. The Board rejects the bad faith argument as being without substance and accepts the employers argument that the successful applicant is a member of the bargaining unit. The question of seniority is not an issue here because the grievor's previous position was not related to the one sought. The University was within its rights to fill the job as it did.

DISSENT (McIntyre): Mr. McIntyre feels that the decision of the majority contradicts the collective agreement which speaks directly to matters of bargaining unit employees, promotions and seniority. This makes the decision a bad one because it purports to alter the agreement. The majority read into the agreement an intent of the parties that was not there.

DECISION: 86-23

Pictou District School Board **AND** Canadian Union of Public Employees, Local 867

S. Bruce Outhouse, Arbitrator

A. K. Cunningham, for the union
Bruce T. MacIntosh, for the employer
March 4, 1986

ISSUES: Management Rights 5:0000; Interpretation: Intention of the Parties 4:2100, Context 4:2100, 4:2300.

CIRCUMSTANCES: A disagreement has arisen over whether employees, hired before May 5, 1982, whose positions have been made redundant are guaranteed job security without layoff or protection against transferability so long as they remain in their original place of employment.

The union claims that the agreement protects those employees except where it is physically impossible for the employee to continue in the position. The employer claims that the agreement only protects those employees from being bumped by other employees on the basis of bargaining unit-wide seniority.

AWARD: The grievance fails. The arbitrator is convinced, from the arguments presented, that neither side acted in bad faith and that there was a genuine misunderstanding as to what each side intended in the article in question.

In order to resolve the ambiguity the arbitrator looks to other provisions in the collective agreement and the logical conclusion lies in favour of the employers' stance. The union's interpretation of the article regarding job security is a fairly rare interpretation and if it were truly meant to be the intent of the parties the article most likely would have been set out more clearly. The conclusion is that the article in question prevents pre-May 5, 1982 employees from being bumped out of their positions as a result of inter-regional bumping based on bargaining-unit seniority. It does not prevent them from being laid off or transferred in accordance with the terms of the agreement.

AUTHORITIES: Sealy (Western) Ltd. and Canadian Bedding & Furniture Ltd. and Teamsters Union, Local 351 (1982), 5 L.A.C. (3d) 360 (Hope).

DECISION: 86-24

Town of Louisbourg Police Department AND Canadian Union of Public Employees, Local 2279

Robert F. Ferguson, Chairman; Kevin MacNeil, T.J.K. Gillis

Duncan Maclean, for the union
Hugh Macleod, for the employer

ISSUES: Working Hours and Shifts: Transfers Between Shifts 5:2000, 5:2500; Management Rights: Work Assignment 5:2000; Work Assignment: Bargaining Unit 5:1200.

CIRCUMSTANCES: A constable on the Louisbourg police force was sent out of town on a course, causing him to miss four regular shifts. The grievor claims that he was the union member entitled to work those shifts. The employer violated the collective agreement when a non-bargaining unit employee, the Chief of Police, took over the shifts.

The employer views the working of the shifts as a matter of rescheduling which is the duty of the Chief of Police.

AWARD: The grievance succeeds. This is not a case of scheduling or rescheduling but of the filling of a vacancy by a non-bargaining unit employee. The employer's actions constitute a clear violation of the collective agreement. The employer is ordered to compensate the grievor for 40 hours of lost work time at his regular rate of pay.

DECISION: 86-25

Oland Breweries Limited AND Brewery and Soft Drink Workers, Local 361

J. A. MacLellan, Arbitrator

Gordon N. Forsyth, for the union
Eric Durnford, for the employer
March 11, 1986

ISSUES: Discipline and Discharge: Grounds for - Absence from Work 7:3100, Failure to Notify Employer 7:3110, Reasonable Excuse 7:3112; Illness or Disability: Employer Response - Alternatives to Termination - Absenteeism 7:3200.

CIRCUMSTANCES: The grievor had been discharged for failure to notify his absence properly, after a previous written warning that further incidents would result in dismissal. Asked to work overtime on a Friday, he refused. Late Thursday night, he left a note on the bulletin board saying only that he would not be in Friday and did not appear for regular or overtime work until his Sunday midnight shift. The company was particularly inconvenienced because of a planned repair shutdown on Monday. When supervisors demanded an explanation of his Friday absence, he told one 'there are two kinds of sickness'. To a second, still giving no explanation, he denied that his note was "unsatisfactory". These two did not believe any part of the grievor's story. A third supervisor stated that he believed that the grievor had actually left the note.

The grievor agreed that he had refused to work voluntary overtime on Friday, but disagreed about his absence on regular shift. He

testified that he had hurt his back and left the note on Thursday night, was in pain and slept in until 2:30p.m. Friday, and went to the hospital for back pain on Sunday.

AWARD: The grievor succeeds in part, being reinstated without back pay for his two months off. The arbitrator found good cause for suspicion by company officials and criticized the grievor's cavalier attitude in the note and later explanations. The company therefore acted in good faith in the discharge. However, he believed that the grievor had left the note and was medically unable to work. A mitigating factor was the fact that the company, despite written plant rules, had accepted such notes in the past.

DECISION: 86-26

Dawson Memorial Hospital **AND** Nova Scotia Nurses Union of the Dawson Memorial Hospital

Milton J. Veinot, Chairman; John MacPherson; Donald McDougall

David Reynolds, for the union
E. B. Durnford, for the employer
March 12, 1986

ISSUES: Interpretation: Intention of the Parties 4:2100; Seniority: Acquisition - Non-working Periods 6:1110.

CIRCUMSTANCES: Having worked a cumulative total of 21 full-time years and 2 1/3 part-time years for the employer since 1948, the grievor protested when she received one month's salary on retirement, the amount specified in the collective agreement for a 10-15 year employee. The union argued that in the clause affecting retirement allowances, continuous service was not specified. The contract was silent.

The hospital stated it had no legal obligation at all since the grievor left their employee voluntarily as she had on previous occasions. It argued that in any case her retirement allowance was based on the last period of continuous service, and in accord with the contract.

AWARD: The grievance fails. The board nevertheless held that there was a legal obligation for the retirement allowance, that the employee had given notice in good faith on grounds of failing health and age, and was otherwise eligible. However, they held that a continuous-service clause in the general preamble to the contract indicated the intention of the parties. The minimum period on which benefits were based should thus be construed as the last period of continuous service. In addition, previous arbitration cases found that benefits did not accumulate when

service was broken and when the contract was silent.

DISSENT (MacPherson): The dissent is based on two arguments. Firstly, a distinction is drawn between short-term benefits, such as vacations, which are accumulated on an annual basis and exhausted within the same annual basis, and long-term benefits, such as service awards, accumulated through years of employment. Second, it is argued that within the relevant article, where the parties have wished to restrict a benefit by requiring continuous service, they have expressly stated that restriction. No such restriction is present in the clause in question, therefore, it should not be implied by the Board.

AUTHORITIES: Re United Steelworkers of America and Westeel-Rosco Ltd. (1968), 19 L.A.C. 378 (Brown) at pp.380, 382; Re Hotel Clubs etc., Employees Union, Local 261 and Beacon Realty Ltd. (1968) 19 L.A.C. 227; Re Soeurs de la Charite d'Ottawa and Syndicat des Services (1973), 3 L.A.C. (2d) 392 at p. 401; Re Nova Scotia Teachers Union v. Cape Breton Board (N. S. Arbitrations 85-55A).

DECISION: 86-27

IMP Group Ltd. AND IMP Aerospace Employees Association

Douglas G. Ruck, Arbitrator

ISSUES: Interpretation: Intention of the Parties 4:2100; Overtime: Call-in Pay 8:3410.

CIRCUMSTANCES: The union filed a policy grievance on behalf of a number of workers for overtime pay for an entire shift, under an emergency shutdown clause in the collective agreement. Toxic paint fumes caused a shutdown preventing work on an overtime shift.

The company did not dispute the facts of the dangerous fumes or shutdown, but argued that the applicable contract clause was one stipulating much smaller call-in pay for cancellation of an overtime shift.

AWARD: The grievance succeeds in part. Though the arbitrator found that the emergency clause applied only to regular shifts, he determined that because the Saturday shift was cancelled well after it had begun, the employees should be paid overtime rates for the two hours when they were at the plant and available for work.

DECISION: 86-28

Civil Service Commission AND Nova Scotia Government Employees

26

Union

Bruce Outhouse, Arbitrator

Ronald Pink, for the union
Jonathan Davies, for the employer
March 4, 1986

ISSUE: Disciplinary penalties: Culminating Incident 7:4310.

CIRCUMSTANCES: The employee in this case received a very poor yearly performance assessment as a result of a number of incidents which had occurred in the past year. Disciplinary action had been taken in some cases but not all. As a result of the assessment he received a formal letter from the Acting Deputy Minister informing him of a 4-day suspension. The letter also stated that his performance had to improve or his employment would be terminated.

The employer claims that the performance evaluation was the occasion of the discipline and not the reason for the discipline. It claims that recent medication errors were justification for discipline and that it was entitled to determine a penalty based on the grievor's past record.

The union claims that the grievor was disciplined as a direct result of his negative performance assessment. It states that the employer is not entitled to open up old incidents once they have passed, and even if the employer was entitled an unreasonable amount of time had lapsed since their occurrence. In addition, the employer should not reopen incidents for which it had already decided not to take disciplinary action.

AWARD: The grievance succeeds on the basis that the doctrine of culminating incident, which the employer is arguing, does not apply in this case. In the letter to the grievor the employer did not rely on particular incidents to justify the disciplinary action. There has to be a culminating incident for the employer to argue this doctrine successfully. Consequently, it follows that the reason for the discipline was the negative performance assessment and the employer has already acknowledged that an employee cannot be punished for a poor evaluation.

The employer is ordered to remove the letter of discipline from the grievor's record and to compensate him for lost wages and benefits.

AUTHORITIES: Re Air Canada and Canadian Airline Employees Association (1981), 4 L.A.C. (3d) 68 (Shime); Re Corporation of the Borough of North York and Canadian Union of Public Employees, Local 373 (1979), 20 L.A.C. (2d) 289 (Schiff); Re Brunswick Bottling Ltd. and Retail, Wholesale & Department Store Union,

Local 1065 (1984), 16 L. A. C. (3d) 249 (Iwanicki); Re Nova Scotia Government Employees Union of behalf of Robert Estabrooks and Civil Service Commission (October 23, 1985), unreported (Outhouse); Re SKF Manufacturing of Canada Limited and International Association of Machinists, Local 901 (1975), L.A.C. (2d) 139 (Shime); Re Etobicoke General Hospital and Ontario Nurses' Association (1977), 15 L.A.C. (2d) 172 (Brandt); Re Hawker-Siddeley Canada Ltd. and Industrial Union of Marine & Shipbuilding Workers, Local 1 (1976), 13 L.A.C. (2d) 1 (Richard); Re Bay Forest Products ltd. and International Woodworkers of America, Local 1-217 (1979), 21 L.A.C. (2d) 212 (McKee); Brown and Beatty, Canadian Labour Arbitration (2d ed.) p. 476-480.

DECISION: 86-29*

Civil Service Commission of Nova Scotia **AND** Nova Scotia Government Employees Union

Mr. Justice Nathanson

R. A. Pink, for the union
A. W. Scott, for the employer
March 11, 1986

ISSUES: Judicial Review: Excess of Jurisdiction 1:5300; Procedure: Relief Against Time Limits 2:3140; Time Limits: Restriction on Arbitrability 2:1100.

CIRCUMSTANCES: This is an application to the Supreme Court of Nova Scotia, Trial Division to quash a previous award. In that case the grievors claimed that the employer had not provided them with the automatic promotion to which they were entitled.

The employer argued that the grievances had not been brought forward within the specified time limit. The argument of the union was that the doctrine of promissory estoppel was applicable in this case and the employer should not be allowed to rely on the timeliness provision in the agreement.

The union argued that even though the employer has the right to reclassify employees under the provisions of the agreement, in the past reclassification had been automatic when employees received their yearly merit increases. The union relied on this past practice and consequently, did not bring the issue forward in contract negotiations. The existence of this estoppel acted as a waiver of the time limit specified in the agreement.

The arbitrator found that the grievances were untimely under the provisions of the agreement. However, he also felt that the doctrine of promissory estoppel was applicable despite the untimeliness of the grievance. He allowed the grievance to

proceed.

The question in this application is whether the arbitrator exceeded his jurisdiction in proceeding with the case once he found that the grievances were untimely. The union claims that whether or not the grievances were untimely is not subject to judicial review.

AWARD: The judge rules that the arbitrator exceeded his jurisdiction when he proceeded to hear the case after finding it untimely. In addition the arbitrator again exceeded his jurisdiction when he found that the employer had violated the pay provisions in the agreement since this decision was not based on evidence. An arbitrator exceeds his jurisdiction when he makes a decision which is unsupported by evidence.
The application is granted and the award of the arbitrator is quashed and set aside.

AUTHORITIES: Syndicat des Professerus de College de Lens-Lauzon et al v. College d'Enseighnement General et Professionel de Lens-Lauzon et al, 85 C.L.L.C. 12, 166 Union des employes de Commerce, Local 503 v. Roy (1980) C.A. 394; Union Carbide Canada Limited; City of Vancouver v. Brandram-Henderson of B. C. Limited (1960) S.C.R. 539 at p.550; Re International Woodworkers of America, Local 1-118 and Sooke Forest Products Ltd., 1 D.L.R. (3d) 622 at p. 625; Re Hawker Siddeley Canada Inc. Trenton Works Division and United Steelworkers of America, Local 1237 150 D.L.R. (3d) 509 (N.S.S.C.T.D.); Civil Service Collective Bargaining Act, S.N.S. 1978 c.3.

* See 85-60 for summary of original arbitration decision.

DECISION: 86-30

Nova Scotia Power Corporation **AND** International Brotherhood of Electrical Workers, Local Union 1928

W. Brent Cotter, Arbitrator

Gerald J. McConnell, for the union
Terry L. Roane, for the union
March 14, 1986

ISSUES: Interpretation: Management Rights 4:2300; Intention of the Parties 4:2100; Lunch Breaks 8:3700.

CIRCUMSTANCES: This arbitration is a policy grievance regarding the interpretation of lunch time provisions in the collective agreement. The employees are allowed 30 minutes for lunch. The issue is whether they can travel, on company time, to headquarters for their lunch. Early in 1985 the company issued a

directive to employees which stated that employees working at substation 2a and 3c who previously were transported to headquarters, were to remain on-site to eat their lunches in the room provided. Facilities for hot lunches in the substations were not available for safety reasons.

The union claims that the provision in the agreement which allows those employees working within a 10 minute distance from headquarters to be transported back, on company time, for lunch is an employee benefit clause. The employer is not required to provide a suitable place for eating lunches at the substations and in doing so, when one already exists at headquarters, took away the employees' right to be transported to headquarters.

The employer claims that it has the right to deliver employees either to headquarters or any suitable location and it has the right to designate that location. The management rights provision gives them this authority to create a suitable location and substation 2a and 3c are suitable.

AWARD: The grievance succeeds. The arbitrator finds that the transportation for lunches provision in the agreement is definitely an employee benefit clause which is aimed at redressing inconvenience to the employee due to dislocation from defined headquarters. The redress takes the form of transportation back to headquarters or to a suitable location. The clause does not provide for the creation of such a location by the employer. By creating other locations and not allowing employees to go to headquarters for lunch, the company is taking away an employee's right to use his/her lunch time as he/she wants. The clause allows for transportation to and from a headquarters and is limited to those employees within a 10 minute drive. The management rights clause does not give the employer the right to create suitable locations at substations 2a and 3c and thereby alleviate their obligation to provide transportation on company time.

DECISION: 86-31

Bowater Mersey Paper Company Limited AND Canadian Paperworkers Union, Local 141 and 259

S. Bruce Outhouse, Arbitrator

Ronald A. Pink, for the union
J. T. MacQuarrie, for the employer
March 18, 1986

ISSUE: Collective Agreement: Form and Content - Ancillary Documents - Pension, Insurance and Welfare Plans 4:1400.

CIRCUMSTANCES: The grievor has been collecting long-term disability insurance for over one and a half years. The insurer terminated the benefits on the grounds that the grievor was able to perform other duties in the mill than the one he was trained to do. In this grievance the union claims that the company has violated the collective agreement because it has failed to provide benefits for the employee.

The employer objects to the arbitrability of the case. Under the provisions of the agreement it is obliged to arrange and pay for long-term disability but it is not obliged to pay these benefits. The employer relies on the wording of the agreement to support its argument. All mention of long-term disability are worded so that it is obvious that the benefits are to be paid by the insurer and not the employer. When the employer is to be directly responsible for payment of benefits it is clearly stated in the agreement. In addition, the employer argues that this is the first time the union has tried to get benefits from the employer, even though the insurance policy has been in effect for some years.

The union states that the employer's principal obligation is to ensure payment of benefits granted in the agreement. The union has an agreement with the employer and not the insurance company. The employer can use whatever means to meet its responsibility but ultimately it is responsible for the payments.

AWARD: The grievance fails as the arbitrator feels that the employer's obligation is to arrange and pay for insurance coverage and not to make direct payments. The language of the collective agreement is clear in directing the conclusion that the parties contemplated the provision of long-term benefits via an insurance policy. The employer's objection to the arbitrability of the grievance is allowed.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration (2nd ed.) p. 175-177; Re Canadian Ohio Brass Company Limited and International Chemical Workers, Local 345 (1973), 3 L.A.C. (2d) 27 (Weatherill); Re National Grocers Co. Ltd. and Warehousemen and Miscellaneous Drivers, Local 419 (1973), 4 L.A.C. (2d) 400 (Weatherill); Re Consumers Glass Company Limited and United Glass and Ceramic Workers of North America, Local 200 (1974), unreported (Weatherill); Re Foster Wheeler Limited and United Steelworkers, Local 6519 (1975), 8 L.A.C. (2d), 342 (Weatherill); Re Certified Automotive Products (Central) Limited (Royal Industries) and United Steelworkers of America, Local 14831 (1976), unreported (Teplitsky); Re Andres Wines (B>C>) Ltd. and United Brewery Workers, Local 300 (1981), 30 L.A.C. (2d) 259 (Christie); Robb Engineering and United Steelworkers of America, Local 4122 (1982), unreported (Outhouse); Re Thompson Products Employees Association and Thompson Products (1970), 21 L.A.C. 125 (Weiler); Re Canadian Car Division, Hawker-Siddeley Canada Ltd.,

and United Automobile Workers, Local 1015 (1981), 1 L.A.C. (3d) 331 (Hinnegan); Re United Automobile Workers and Young Spring & Wire Corp. (1962), 12 L.A.C. 246 (Cross); Re International Association of Machinists, Lodge 171 and Fleet Manufacturing Limited (1967), 18 L.A.C. 311 (O'Shea); Insurance Act, R.S.N.S., 1967, c.148.

DECISION: 86-32

Rossignol Construction and Forms Limited **AND** United Brotherhood of Carpenters and Joiners of America, Local 83

W. H. Kydd, Arbitrator

Ronald Pink, for the union
March 21, 1986

ISSUE: Union: Dues - Checkoff 9:1200.

CIRCUMSTANCES: The grievance is brought by the union against the company for violation of the collective agreement when it failed to remit deductions and union dues to the union for a six month period. The union produced pay stubs as evidence that the money had been deducted from the employees' cheques by the company.

There was no representation from the company at the hearing.

AWARD: The grievance succeeds. It is clear that the company has violated the provisions of the collective agreement by not remitting deductions to the union. The company is ordered to pay what it owes to the union.

DECISION: 86-33

Board of Governors, University College of Cape Breton **AND** Teachers Bargaining Unit, Nova Scotia Government Employees Union, Local 18

S. Bruce Outhouse, Arbitrator

Ronald A. Pink, for the union
J. Bernard Boudreau, for the employer
March 27, 1986

ISSUES: Interpretation - Reasonableness 4:2100; Intention of the Parties 4:2100; Layoff 6:2200; Management Rights 5:0000.

CIRCUMSTANCES: The union claims that the employer violated the collective agreement when it gave lay-off notices to the grievors without just cause. All four grievors are employed as instructors at the University College of Cape Breton. They were

issued lay-off notices in July 1985 to take effect 60 days later, in accordance with the agreement. This action was taken as a result of the declining number of student days funded by both the federal and provincial governments. During this time the employer sponsored non-government funded programs which created additional work for the instructors. As a result, the lay-off dates were postponed until February and March 1986.

The grievors initiated the grievance procedure upon receipt of the second notice, claiming that the employer should have cancelled the original lay-off notices, and that it did not have just cause to institute the lay-offs due to the improved situation.

The employer argues that under the clause in the agreement it is not required to have just cause for a lay-off. The concept of just cause relates to discipline and it has no application in the context of a lay-off. Even if it did, just cause can be found in this case.

AWARD: The grievance fails. The key issue in this case is whether the lay-off clause in the agreement required the employer to have just cause. The arbitrator finds that the language in the agreement is clear with respect to this issue. The just cause statement refers to the previous clause dealing with discipline and discharge. In addition, the concept of just cause as it is traditionally understood in labour relations does not have any dealings with lay-offs. If that were not the intention in this case then the wording of the agreement would be much different.

DECISION: 86-34

Nova Scotia Hospital AND Nova Scotia Government Employees Union

Peter E. Darby, Arbitrator

Ronald A. Pink, for the union
William M. Wilson, for the employer
March 15, 1985

ISSUES: Illness or Disability: Burden of Proof - Employer Allegations 7:3250, Employer Response - Alternatives to Termination - Absenteeism 7:3200; Discipline and Discharge: Grounds for - Absence from Work 7:3100; Culminating Incident 7:4310, Grounds for - Refusal to Obey Instructions 7:3610; Evidence: Admissibility - Relevance 3:4200.

CIRCUMSTANCES: The grievor has a record of excessive days of absences during his time in the employ of the hospital. The hospital took the action of requiring him to fill out a

Prescription Pad Certificate, a medical evidence that he was unfit for work. When the absences continued the employer ordered the grievor to submit medical assessments, a much more detailed and complete record outlining the reasons for his absence. After yet another absence during which time the grievor failed to produce the required form, management reviewed his history of absences and awarded a one-day suspension for non-compliance with an order. He was also disallowed sick pay.

The grievor claims he was unable to obtain the appropriate form because the hospital did not send them to the Unit as he was told they would. He had relied on this source for the forms and it is unreasonable for him to be penalized for his reliance. In addition, the argument is made that the hospital has not been consistent with its insistence on compliance with the order to provide the form. This inconsistency constitutes unreasonable demands.

Finally the union argues that there is no just and reasonable cause for the discipline because of the unusual circumstances of the grievor's motorcycle accident. His arrival at work the next day, showing evidence of his injury should be considered sufficient compliance with the order.

The claim is also made that the arbitrator is without jurisdiction to review the grievor's past history of absenteeism since he is being disciplined for one isolated incident.

AWARD: The grievance fails and the disciplinary action of the employer is upheld.

The arbitrator rules that the past history of the grievor is admissable because of the need to know of the prior warnings which led to the hospital's action. Also, he upholds the view that this incident can be seen as a culminating act of misconduct, in which case the past history of absences is relevant.

The argument of injurious reliance on the hospital's past practice of providing the forms is disallowed. The fact remains that the form was not produced and the grievor made no attempt to provide alternate documentation, knowing that he could not obtain the required form.

Finally, the argument of inconsistency of enforcement of rules is also rejected. The grievor had been given numerous warnings and he was well aware of what the consequences of his actions might be. The hospital did not act in an unjust and unreasonable manner.

AUTHORITIES: KUP Co. Ltd. (1965), 16 L.A.C. 73 (Robinson); Brown

and Beatty, Canadian Labour Arbitration, (2d ed., 1984, Can. Law Book Co.) p.180, p.475-6; N. S. Government Employees Union (Edmonds) and Civil Service Commission (Oct. 13, 1983) (Outhouse) (unreported); N. S. Government Employees Union (Zinck and Ross) and Civil Service Commission (Feb. 11, 1982) (Christie); Re Metropolitan Toronto Board of Commissioners of Police and Toronto Metropolitan Police Association et al. (1981), 124 D.L.R. (3d) 684 (Ont. C.A.); Nova Scotia Nurses' Union (Fleet) and Dartmouth General Hospital and Community Health Care (Oct. 1984) (Darby) (unreported); Nova Scotia Nurses' Union (Halifax Infirmary Local) and Halifax Infirmary Hospital (1983), 54 N.S.R. (2d) 289 (N.S.S.C.A.D.).

DECISION: 86-35

Civil Service Commission **AND** Nova Scotia Government Employees Union

T. A. Cromwell, Chairman; Eric B. Durnford; David P. Reynolds

R. Pink, for the union
Jonathan Davies, for the employer
January 29, 1986

ISSUES: Policy Grievance - Limitation, Imposed by Agreement 2:1100, Nature of 2:3124; Res Judicata: Abandonment, Settlement, or Withdrawal 2:3230.

CIRCUMSTANCES: As a result of an incident in the workplace the grievor was suspended without pay. A meeting, which was to form part of the employer's investigation regarding disciplinary action, was scheduled for the day the suspension was to take place. The grievor was denied the right to have union representation at that meeting. The union claims that in any meeting which will discuss the discipline imposed, or the incidents leading up to the discipline, the employee is entitled to be accompanied by a union representative. The employee failed to attend the initial meeting and another was scheduled. As a result of that meeting the employee was reinstated without loss of salary or seniority and the grievance was withdrawn. The union has now introduced a policy grievance regarding interpretation of the clause in the agreement which, the union claims, guarantees employees the right to union representation at these meetings once the grievance has been filed.

Before hearing the merits of the case the employer raised two preliminary objections. In the first case the employer argues that the matter is res judicata. The policy grievance is barred since it is regarding the same issue as the initial employee grievance. The union cannot introduce the same issue twice. In the second case, the employer claims that this, in fact, is not a policy grievance because there is no dispute and, because it was

first raised as an individual grievance it is excluded from being raised as a policy grievance. The employer argues that any matter which can be brought as an individual grievance is excluded from being brought as a policy grievance.

The substantive issue in question is does the agreement give an employee the right to be accompanied to an interview with management to discuss the grievance even if the interview is not part of the formal grievance procedure? The clause allows for the employee to be accompanied by a union representative in two situations and this employee's case, according to the union, is covered in both instances. The instances are as follows: when an employee presents his grievance in person, and where a hearing is held in a grievance at any stage of the grievance procedure. The union concedes that this interview was not part of the formal procedure but it claims that it does not make any difference since the grievance had been filed.

AWARD: The preliminary objections were denied by Board. In the first preliminary issue, the Board does not accept that this is the same grievance as the one that was withdrawn. The first grievance was complaining of the employee's suspension without just cause. This grievance involves the interpretation of the agreement and the only relief sought is a declaration. In addition, res judicata would probably not apply, since the initial grievance was withdrawn.

In the second preliminary issue: the first argument is rejected since it is clear that there is a dispute on the interpretation of the agreement. The second argument would clearly draw the line between individual and policy grievances, making them mutually exclusive and would greatly hinder the grievance procedure. It is clear that this is a policy grievance which hopes to resolve the dispute without putting an individual employee at risk. Previous arbitral decisions do not presume that the two grievances are mutually exclusive and the agreement does not lead to any other conclusions. The agreement simply means that a policy grievance is an alternative when an individual can grieve in his own right. Both preliminary issues fail.

The grievance fails and is dismissed. The Board finds that the employee was not automatically entitled to union representation in either instance provided for in the agreement. In the first instance the employee was not giving the formal document of the grievance to the employer. In the second instance, the Board finds that the agreement makes a definite distinction between a hearing which is held as part of the formal grievance procedure, and a meeting such as the one which is at issue here. Since the meeting was scheduled prior to the filing of the formal grievance it cannot be said that the subject of the meeting was the grievance. In addition, the representatives of the employer who

were at the meeting were not those who are stipulated by the agreement to attend meetings which are part of the formal grievance procedure. The agreement clearly states that in the pre-grievance stage the employee may have a Stewart present, but this is not a guaranteed right.

DISSENT (Reynolds): The conclusion that the clause refers only to a hearing held as part of a formal grievance procedure is opposed. In the union's point of view, meetings can be considered part of the formal grievance procedure when they discuss any aspect of the grievance. In the present case, the deputy head of the department, even though he did not attend the meeting, made his decision as to his course of action as a result of information gathered at the meeting. The deputy head is the person designated in the final level of the grievance procedure, therefore it can be argued that this meeting was part of the formal procedure. The purpose of the article in question is to impose an obligation on the employer to allow union representation at a hearing. In the majority view the employer can avoid this by choosing to make the interview less formal and to class it as a meeting. When the employee is ordered to attend an investigation and to answer questions, after a grievance has been filed, he should be entitled to union representation.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration (2d) 1984, p.92, 106; Fermini v. McGuire (1984), 42 C.P.C. 189 (N.S.S.C.A.D.); Greenhalgh v. Mallard (1947), 2 All E.R. 255 (C.A.); Fenerty v. Halifax (1970), 53 N.S.R. 457; Re Bell Canada and Communication Workers of Canada (1982), 3 L.A.C. (2d) 413 (Burkett); Re Canex Placer Ltd. and Allied Workers (1978), 21 L.A.C. (2d) 127 (Weiler); Re American Car of Canada Ltd. and Sheet Metal Workers (1975), 10 L.A.C. (2d) 73 (O'Shea); Re Canada Safeway Limited and Retail Clerks' Union (1978), 19 L.A.C. (2d) 59; Re Consumers Gas Co., 15 L.A.C. (2d) 85 (Brown); Re Consumers Gas Co., 15 L.A.C. 266 (Burkett); Re Labatts Ontario, 5 L.A.C. (3d) 32 (McLaren).

DECISION: 86-36

Canadian Salt Company Limited **AND** Energy & Chemical Workers Union, Local 823

Milton J. Veinot, Arbitrator

Bruce MacIntosh, for the employer
March 7, 1986

ISSUES: Working Hours and Shifts 5:3100; Past Practice 3:4430; Overtime: Defining Overtime - Daily Overtime 8:2100, Scheduling 5:3100; Interpretation 4:2000, Intention of the Parties 4:2100, Management Rights 4:2300.

CIRCUMSTANCES: A general policy grievance is brought by the union to challenge the employer's right to make certain shift changes. The employer's mining operation is carried out by work crews which normally follow either a day shift (8 a.m. to 4 p.m.) or an afternoon shift (4 p.m. to midnight) for a five day period. However, some members of one crew were given a mixture of day and afternoon shifts during the same week, and it is this "bastard shift" which forms the basis of the grievance. The union claims the mixture of day and afternoon shifts violates established past practice, that workers are entitled to consecutive day or afternoon shifts in one week, and that the employer should pay an overtime premium for the week in question. The employer argues that it was within its rights to institute such shifts, that it did so for bona fide business reasons, and that the collective agreement does not support the union's claim.

AWARD: The grievance is dismissed. After hearing witnesses and considering evidence, the Board finds the employer did not violate the collective agreement. Interpretation of the relevant articles indicates the employer has retained the right to change hours of work; it did so in the present case for valid reasons and did not abuse its power. As evidence shows there were several previous variations in scheduling, the past practice argument does not apply. Neither is a premium due as the pertinent clause does not cover the circumstances at issue. The Board must determine the intention of the parties from the wording of the agreement. It cannot make new bargains.

DECISION: 86-37

Canadian Salt Company Limited AND Energy & Chemical Workers Union, Local 823

Milton J. Veinot, Arbitrator

Bruce MacIntosh, for the employer
March 31, 1986

ISSUES: Jurisdiction: Sources - Collective Agreement 2:1200; Remedies: Authority to Award - Restricted by Collective Agreement 1:5300, 2:1400.

CIRCUMSTANCES: The grievor was requested by a member of management to fill a propane gas tank. The grievor did not hold a valid certificate to do this, as required by regulations to the Nova Scotia Fire Prevention Act. He filled the tank because he felt pressured to do so by his superior. The grievor now seeks a written apology from the employer for being forced to carry out this dangerous and unlawful act.

AWARD: The grievance is dismissed. Although the board feels an apology would be in order, it has no jurisdiction to make such an order. The Board can only impose obligations arising out of the collective agreement, which contains no article to support the request. The Board has no punitive function and cannot substitute its views for what the parties have agreed to by negotiation.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration; Nova Scotia Fire Prevention Act, Regulations, s.26.

DECISION: 86-38

United Steelworkers of America, Local 4702 **AND** Pictou Industries Limited

Bruce Outhouse, Arbitrator

John MacPherson, for the union
John Plowman, for the employer
April 7, 1986

ISSUES: Interpretation 4:2000, Intention of the Parties 4:2100, Management Rights 4:2300; Lay-off: Apprentices Retained During 6:2330, Bumping Upward 6:2340; Job Classification and Descriptions: Creation or Revision 5:2000; Past Practice 3:4430.

CIRCUMSTANCES: The purpose of this hearing is to settle interpretation issues involved in five individual grievances between the union and the employer. The parties will then attempt to resolve the grievances themselves.

The employer operates a shipbuilding and repair business. The grievors are employed as pipefitters and marine fitters. The grievances arose when the employer failed to promote these employees to positions of first class tradesmen after each had earned the necessary Journeyman Certificates during lay-off periods. The union claims the collective agreement required the employer to automatically promote workers upon obtaining Journeyman Certificates. The employer's position is that the agreement does not restrict its prerogative to promote employees on the basis of ability.

AWARD: There is no obligation to automatically promote the employees. In determining this, the arbitrator must deal with several issues of interpretation. First of all, the agreement's requirement that the employer "recognize" as first class tradesmen those who have earned Journeyman Certificates is "subject to other provisions". These provisions include an article assigning to management the right to assess ability as a

determining factor in promotions.

The second question, is what the term "recognize" does require. The arbitrator finds reasonable the interpretation that those who obtain certificates are prima facie entitled to promotion unless the employer can show lack of ability.

The last three issues involve the question of lay-offs and their effect on promotion. The first is whether the agreement prohibited the lay-off of apprentices, such as the grievors, regarding them as workers participating in training programs. This would allow circumvention of rules determining the order of promotion and recall by seniority. The arbitrator finds that apprentices do not fall within the meaning of the relevant article; wording, consideration of intention, and past practice support this finding.

The final two issues are whether employees on lay-off are eligible to be considered for promotion, and if so, whether such employees can "bump" back into the workforce. Although the employer has adopted a policy against promoting during lay-offs, the arbitrator finds nothing in the agreement to prohibit this. If an employee qualifies and there is a position available, the employer would be obliged to promote. However, explicit wording must be present to allow bumping; a position must be available for promotion to result.

AUTHORITIES: Apprenticeship & Tradesman's Qualifications Act, R.S.N.S. 1967, c.11.

DECISION: 86-39

Town of Amherst AND Amherst Police Association, Local 104 of the Police Association of Nova Scotia

S. Bruce Outhouse, Arbitrator

Bruce W. Evans, for the union
Brian S. Creighton, for the employer
April 14, 1986

ISSUES: Seniority: Acquisition 6:1100; Interpretation: Intention of the Parties 4:2100; Interpretation: Extrinsic Evidence 4:2250; Time Limits: Mandatory or Directory 2:3128.

CIRCUMSTANCES: The employer raises a preliminary objection to the Board's jurisdiction, based on the alleged failure of the union to submit the grievance to arbitration within a time specified in the collective agreement. The objection is dismissed, as the wording of the agreement is interpreted as directory rather than mandatory and there was not undue delay on

the part of the union. The grievor and a second officer were interviewed and hired by the employer on the same date. In order to give sufficient notice to his previous employer, the grievor commenced work one week after the other officer. Each officer was promoted in rank according to the date when he actually began to work for the employer - the grievor advancing one week after the other officer. When one senior position became available it was filled by the second officer. The union seeks a declaration that the grievor is equal in seniority to the other officer.

AWARD: The grievance is dismissed. The majority determines that seniority began when work commenced, rather than on the date of hiring. This interpretation of the collective agreement provision that seniority is determined "from the time of employment" is based upon several considerations. Firstly, other articles of the agreement, such as a probation provision, equate employment with actual service, not the date of hiring. Secondly, the grievor was not employed until he became a member of the bargaining unit, at the time work was assigned. Thirdly, the Police Act, s.69, requires an oath to be sworn before office is legally assumed. The oath was taken when actual work began. Finally, accepted past practice with regard to the grievor's dates of advancement confirms the Board's interpretation.

DISSENT (MacDougall): The grievance succeeds. Seniority should be interpreted as commencing on the date of hiring and should not be based on days worked. This is consistent with articles of the agreement and with the fact that the week in question was considered a "leave of absence" for an employee. Brown and Beatty states that seniority commences on the date of hire unless the agreement specifically states otherwise.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration (2nd ed.), p.264; Canadian Union of Public Employees, Local 1047 v. Colchester East Hants Amalgamated School Board (1980), 40 N.S.R. (2d) 132 (N.S.S.C.,A.D); Police Act, S.N.S. 1974, c.9, s.69.

DECISION: 86-40

Joneljim Concrete Construction Limited AND United Brotherhood of Carpenters and Joiners of America, Local 1588

Charles O'Connell, Arbitrator

Ronald A. Pink, for the union
Frank Elman, Q.C., for the employer
April 15, 1986

ISSUES: Interpretation 4:2000, 4:2100; Travel Allowance 8:3700.

CIRCUMSTANCES: The union claims that the employer violated a

transfer clause and travel provisions of the collective agreement. The transfer clause provisions on recruitment of workers was applicable when work involved construction of an "industrial project". The employer's hiring practices would violate the clause if the work in question was viewed as part of such an industrial project. With regard to travel time, the issue was whether it was de..ied to five members of the union.

AWARD: The grievance succeeds on both claims. First of all, it is found that the construction properly falls within the definition of industrial projects. This interpretation is based on the wording of the definition itself, and on plans submitted that refer to the construction as a whole project. The employer must therefore adhere to the transfer clause and pay damages to the union for the breach.

It is also found that the employer violated provisions of the agreement by denying five union members compensation for travel time. Two had received payment through separate agreements, but the other three must be compensated as directed. The employer may not unilaterally contract itself out of the collective agreement.

DECISION: 86-41

Inverness Consolidated Memorial Hospital **AND** Canadian Brotherhood of Railway, Transport and General Workers Union, Local 607

R. Lorne MacDougall, Arbitrator

Victor Tomiczek, for the union
Robert Cook, for the employer
April 16, 1986

ISSUES: Skill and Ability: Senior Employee if Relatively Equal 6:3220; Management Rights: Term of Agreement 4:2300; Interpretation: Words and Phrases - Employees - Temporary 5:1124; Bargaining Unit: Employees Excluded - Temporary, Casual or Part-time 5:1124; Seniority: Applications - Vacancy 5:2510.

CIRCUMSTANCES: The grievor alleges that the employer violated the collective agreement when it filled a job vacancy with another employee who had less seniority than he had. Both candidates are qualified Certified Nursing Assistants and both are presently employed by the hospital. However, as a temporary employee, the grievor argues that he is entitled to the position over a 'casual' employee. Since he was just as qualified as the other applicant his seniority should make him the successful candidate.

The employer argues that of all the applicants for the position

only one had seniority, and that person was not a qualified C.N.A. Consequently the employer felt that it was not bound by the provisions of the agreement. The applicants were judged according to Hospital policy which looks at ability, skill and merit after basic qualifications. The successful candidate was chosen because she was the most qualified for the position and because of her long work history with the Hospital.

AWARD: The grievance fails. The arbitrator upholds the awarding of the job vacancy to the other candidate. Since the grievor and the successful candidate were temporary and casual employees respectively they do not fit within the definition of employee as defined in the collective agreement. Consequently, in this case, the agreement does not apply with respect to the filling of vacancies. As a temporary employee the grievor has preference over candidates from outside the hospital who have no employment relationship with the employer. The successful candidate did have such a relationship so the grievor's temporary employee status does not bring advantage here. Neither has advantage with respect to seniority since the agreement is clear in stating that neither temporary or casual employees can accumulate seniority. Management has the right to employ employees providing it does not break the agreement, and no fault can be found with the hiring process followed in this instance.

DECISION: 86-42

Metropolitan Transit Commission **AND** Amalgamated Transit Union, Local 508

Bruce Outhouse, Arbitrator

Arthur Beaver, for the union
Terry Roane, for the employer
April 16, 1986

ISSUES: Interpretation: Words and Phrases - Vacancy 5:2510; Job Posting: Vacancy 5:2510; Vacancy 5:2510; Interpretation: Intention of the Parties 4:2100.

CIRCUMSTANCES: When a full-time employee took sick and left work, the employer, assuming the employee would be absent for some months due to the nature of the illness, decided to post the position. The original full-time position was offered as a part-time position with an 8 1/2 hour day, 5 days a week. The union feels that since the position was originally full-time it should be made available to full-time employees. Vacancies must respect the distinction between full-time and part-time employees. The employer, in restricting this vacancy to part-time employees, has put the full-time employees at a disadvantage. According to the agreement, the employer is entitled to use part-time employees to

replace full-time employees in situations which are extremely short term. It is inappropriate action in this situation. The employer claims that, according to the wording of the agreement, this position cannot be considered a vacancy. Unless the agreement expressly provides otherwise the term vacancy refers to permanent openings only. The agreement states that part-time employees will fill in for full-time employees when the latter are absent due to illness. There is nothing in the agreement which limits the replacement to any length of time. If a limit is to be found in the agreement, that limit is at least six months or one year. The present vacancy was for a period of two months.

AWARD: The grievance fails. The arbitrator upholds the argument of the employer with respect to vacancies. Unless the agreement provides otherwise, previous interpretations have consistently interpreted vacancy to mean the filling of a permanent vacancy, not a temporary one. In this instance the employer was not obligated to post the position. There is nothing in the agreement which distinguished between the employer's right to use part-time employees to fill in for full-time employees when the absences are either long or short-term. Had a limit been intended, it would be expressly stated in the agreement. The arbitrator finds that the employer has the right to use part-time employees to fill in for full-time employees for as long as the latter are absent due to illness.

AUTHORITIES: Re United Steelworkers and General Steel Wares Limited (1955), 5 L.A.C. 2065 (Taylor); Re United Steelworkers, Local 6571 and Lake Ontario Steel Company (1967), 18 L.A.C. 424 (Weiler); Reliance Electric & Engineering (Canada) Ltd. (1961), 11 L.A.C 345 (Donley); Re Disabled & Aged Regional Transit System and Canadian Union of Public Employees, Local 839 (1985), 20 L.A.C. (3d) 354 (Solomatenko); Brown and Beatty, Canadian Labour Arbitration (2nd ed.) p.241.

DECISION: 86-43

Canadian Brotherhood of Railway, Transport & General Workers, Local 605 **AND** VS Services Limited

Bruce Outhouse, Arbitrator

Ted Powell, for the union
Amery Boyer, for the employer
April 18, 1986

ISSUES: Work Assignment: Compliance with Wage Structures 5:2400; Job Classification and Descriptions - Creation or Revision - Wage Structure 8:1400; Wages: Alteration of Wages 8:1400, 9:1100.

CIRCUMSTANCES: The grievor worked as a pastry chef for the employer. As part of her duties she assumed the position of lead baker whenever the latter was sick or away on holidays. During those times she was paid at the rate of a lead baker. A new contract was signed in which all classifications received a pay increase. The lead baker position was increased the most to bring it in line with the lead cook salary. However, when the employer was calculating the grievor's pay, it applied the increase from the old lead baker rate. The employer claims that the special increase given to the lead baker was based on the incumbent's skill, experience and ability. These special qualifications do not apply in the case of the grievor or any other employee temporarily assigned to replace him. The union claims that the collective agreement clearly sets out the pay scale for the lead baker and any replacements are entitled to receive that rate. It is the job that is classified and rated, not the individual performing the job. The agreement obliges the employer to comply with the wage scale.

AWARD: The grievance succeeds and the employer is directed to compensate the grievor in full. The agreement clearly provides a rate in the wage schedule for lead baker. There is nothing in the document which indicates that the rate is for the present incumbent only. It follows that the new rate applies to any employee who fills the position, and the agreement clearly states that this is to be the case. There is no evidence which shows that it was the intention of both parties to limit the wage increase to the incumbent lead baker. The agreement does not require an employee who is temporarily replacing another to perform all the duties of the higher classification. Consequently the employer's argument that the grievor is not as qualified and therefore does not deserve to receive the increased rate is quashed.

AUTHORITIES: Re Sudbury Mine, Mill & Smelter Workers' and Falconbridge Nickel Mines Ltd. (1969), 20 L.A.C. 45 (Weiler); Brown and Beatty, Canadian Labour Arbitration (2nd ed.) p.232-233; Re United Steelworkers, Local 2900 and John Inglis Co. Ltd. (1964), 15 L.A.C. 126 (Macdonald).

DECISION: 86-44

Department of Transportation AND Canadian Union of Public Employees, Local 1867

Bruce Outhouse, Chairman; Rick Clarke, Gregory North

Blaise MacDonald, for the union
Jonathan Davies, for the employer
April 16, 1986

ISSUES: Wages: Time not Worked 8:1420; Overtime: Defining Overtime - Daily Overtime 8:2100; Interpretation: Intention of the Parties 4:2100, Reasonableness 4:2100; Management Rights 5:0000; Arbitrability: Settlement of a Grievance 2:3230.

CIRCUMSTANCES: The grievor drives a salt truck for the employer during Official Snow Removal Season (December 1 - March 31). For the rest of the year he does a variety of jobs and works a regular Monday-Friday week within nine hour days. On April 1, 1985 the grievor worked his regular shift. He was called back at 8:00 p.m. that night to drive the salt truck because a snowstorm had come up. He worked through the night and returned to the station expecting work another regular day. At 8:00 a.m. he was sent home by his supervisor, who thought the grievor looked tired. The grievor was not approached about this. He was the only one sent home even though there were others who had worked longer. He was called out again at 11:00 p.m. that night and worked until 4:00 a.m. He reported for work again at 7:00 a.m. and stayed for his regular shift.

This grievance arises with respect to how the grievor was paid for the time worked on these two days. The grievor expected to be paid for his regular working day on April 2 and overtime for the hours from 12:01 a.m. to 7:00 a.m. and 11:00 p.m. to 12:00 p.m. In effect, he was paid, after some confusion on the employer's part, for his regular nine hour shift and for eight hours outside his regular shift at the regular rate of pay.

At the outset of the hearing the employer raised a preliminary objection claiming that the initial grievance had been filed because the grievor had not been paid for his regular shift of April 1. Since that situation had been rectified there is no grievance. The grievor's entitlement to overtime is a different matter, and should be submitted as a separate grievance. This objection was dismissed with the argument that the grievance was based on inappropriate pay treatment for the grievor's work on April 2. Initially the grievor had not been paid for the time that he was sent home but he had been paid for the overtime. After the grievance was submitted the employer responded by paying him for the daily shift but, at the same time, his overtime was taken away. The issue of incorrect pay treatment remains the same.

The union claims that the grievor was at all times an employee whose regular hours were a nine hour day. He was entitled to be paid for those hours as well as overtime for any time worked outside those hours. The agreement states that employees engaged in snow removal are not eligible for overtime. This, however, does not apply in the grievor's case since this is only in effect during the Official Snow Removal Season. The agreement also makes ineligible those employees who are standby. The grievor

was not on standby since he was never told by the employer that he should make himself available for recall.

The employer considers the grievor to have been on standby when he was sent home. He was not told that specifically but it was apparent that the conditions at the time fit within the parameters of the agreement with regards to Standby Pay. Consequently he only received regular pay for the extra eight hours.

AWARD: The grievance is allowed and the employer is directed to pay the employee for his regular shift plus overtime for the additional hours worked. The Board finds that the standby provisions of the agreement do not apply in this situation. The grievor was not instructed to remain available for work and he was sent home based on the judgment of the supervisor. The agreement defines an employee as unable to work if he is sent home due to interruption on normal operations by bad weather or similar conditions. In cases such as these the employee can be considered to be on standby. The grievor's case does not fall into one of these situations. The employer owes the grievor payment for the regular working day since the decision to send him home was an arbitrary one made by the supervisor even though the grievor was prepared to complete his shift and was not complaining of overtiredness. Since other employees had been allowed to stay and since no investigation into the alleged safety hazards was made then, this decision on the part of the employer is judged to have been an unreasonable one.

DISSENT (North): The minority takes exception to the majority's decision with regards to the payment for the regular shift when the employee did not work. There is nothing in the agreement which limits the employer's right to determine that an employee is not required for a certain shift. This decision should obviously not be made unreasonably or with discrimination, but as long as it is a valid business decision management rights should be respected. The standby provisions of the agreement clearly state all situations when an employee can be paid for not working. Other situations, such as the one disputed here, do not apply. The employer acted in a responsible manner with regards to public safety when it sent the grievor home. The grievance should have been dismissed.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration (2nd ed.) p. 542; Re Inglis Limited and United Steelworkers, Local 4487 (1978), 17 L.A.C. (2d) 380 (Beck); Re United Automobile Workers, Local 127 and Ontario Steel Products Ltd. (1972), 23 L.A.C. 386 (Hinnegan); Re Industrial Union of Marine and Shipbuilding Workers of Canada on behalf of John Petrie et al and Halifax Industries Limited (September 10, 1982) unreported (MacLellan).

DECISION: 86-45
Cumberland District School Board **AND** Canadian Union of Public Employees, Local 1523

Bruce Outhouse, Arbitrator

Richard Fogarty, for the union
David Gruchy, for the employer
April 24, 1986

ISSUE: Skill and Ability: Arbitral Review - Senior Employee with Required Ability 6:3210.

CIRCUMSTANCES: The grievor applied for the position of Head Caretaker and is alleging that the employer violated the agreement when it awarded the position to a less senior employee. A six man panel interviewed the five applicants and chose a candidate based on who they felt was the best person for the job. Of all the candidates, the grievor was only one to file a complaint.

The union claims that the employer did not take into account the grievor's seniority when considering the applicants. The agreement states that the senior employee should be awarded the position provided he/she has the required qualifications. The scoring system used by the employer to judge applicants is not consistent with the agreement since it does not give due recognition to seniority.

The employer claims that the grievor lacks the educational qualifications for the job as set out in the job advertisement. The employer recognizes that the panel may not have been set up in accordance with the agreement but that is not relevant in this case since the grievor did not have the specific qualifications required for the position.

AWARD: The grievance succeeds in part. The selection panel did not act in accordance with the agreement by not considering seniority and in doing so may have prejudiced all applicants senior to the chosen applicant. Under the terms of the agreement the most senior applicant should be compared to the job and not to the other applicants. In addition, the arbitrator is not satisfied that the grievor lacked the necessary qualifications since none of the witnesses would say, categorically, that he was not qualified. On the other hand, there is not enough evidence that the grievor is qualified. Consequently the employer is ordered to conduct a fresh competition for the position limiting it to the original candidates. This is the only fair action considering one of the other applicants was more senior than the grievor, and he too may have been prejudiced by the panel.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration (2nd ed.) p.308; Re Corporation of the City of Toronto and Canadian Union of Public Employees, Local 43 (1978), 17 L.A.C. (2d) 3.

DECISION: 86-46

Canso Sea Products Limited **AND** United Food and Commercial Workers International Union, Local 1252

Judge J. A. MacLellan, Arbitrator

Reg Anstey, for the union
Nancy I. Murray, for the employer
April 30, 1986

ISSUES: Discipline and Discharge: Grounds for - Absence from Work - Failure to Notify 7:3110; Illness or Disability: Effect on Employee - Absence from Work 7:3110.

CIRCUMSTANCES: The grievor was off work on an authorized absence for health reasons. Shortly before the end of this time, a doctor advised the grievor that he should not return to work as early as scheduled. No doctor's certificate was filed with regard to the extension of the period of absence. The grievor maintains that he notified the employer verbally; the employer has no record of having received such notice. In accordance with its strict policy of terminating employees for unexplained absences in excess of three consecutive working days, the employer terminated the grievor. The grievor seeks reinstatement.

AWARD: The grievance succeeds. Although notification could have been clearer, the arbitrator is satisfied from the testimony that the employer was notified within the spirit and intent of the relevant provision of the collective agreement. The grievor is to be reinstated. The arbitrator retains jurisdiction to settle matters of remuneration and benefits if the parties are unable to agree.

DECISION: 86-47

City of Halifax **AND** Halifax Civic Workers' Local 108

Bruce Outhouse, Chairman; Joseph Ross; Matthew McPherson

Bruce Evans, for the union
Gerald Goneau, for the employer
April 29, 1986

ISSUES: Company Rules: Reasonableness 4:2300; Illness or

Disability: Effect on Employee - Absence from Work 7:3110; Discipline or Discharge: Grounds for - Absence from Work-Failure to Notify 7:3110.

CIRCUMSTANCES: The employer had a policy on leaves of absence which required, inter alia, that an employee who failed to report an intention to take time off within the first two hours after starting time of their shift would be subject to disciplinary action. The grievor was ill, overslept, and did not call in sick until after the two hour limit had passed. The employer has imposed a penalty of withholding the eight hours' sick pay to which the grievor would have been entitled, had he called within the time limit. The grievor seeks the full eight hours sick pay. The union argues that the rule is unenforceable, or, alternatively, that it should not be applied to its fullest extent having regard to the circumstances of the case.

AWARD: The grievance is allowed in part. The rule is enforceable; however the employer's practice on penalties for infringement of the rule has been inconsistent. In a similar case, only four hours' pay was withheld. In the circumstances, an eight hour penalty is excessive. It is rescinded and a loss of four hours' pay is substituted. The Board retains jurisdiction to deal with any difficulties which may arise over implementation of the award.

AUTHORITIES: Re Lumber and Sawmill Workers' Union, Local 2537 and KVP Co. Ltd. (1965), 16 L.A.C., 73 (Robinson); Re Budd Automotive Co. of Canada Ltd. and United Automobile Workers, Local 1451 (1979), 24 L.A.C. (2d) 12 (Shime); Re Gates Rubber of Canada, Ltd. and United Rubber Workers, Local 733 (1978) 20 L.A.C. (2d) 299 (Kennedy); Re Corporation of the City of Toronto and Canadian Union of Public Employees, Local 43 (1978) 20 L.A.C. (2d) 17 (Brent); Re Steel Co. of Canada Ltd. and United Steelworkers, Local 1005 (1975), 8 L.A.C. (2d) 299 (Beatty): Re International Union of District 50, Local 13286 and Stauffer Chemical Co. of Canada Ltd. (1970), 22 L.A.C. 42 (Brown); Brown and Beatty, Canadian Labour Arbitration (2nd ed.), at p.181.

DECISION: 86-48

Victoria County Memorial Hospital **AND** Nova Scotia Nurses Union, Victoria County Memorial Hospital Local

Bruce Outhouse, Chairman; Ronald Pink, Donald McDougall

David Reynolds, for the union
Robert Cook, for the employer
May 7, 1986

ISSUES: Interpretation: Words and Phrases - Employees-

Temporary 5:1124; Seniority: Applications - Vacancy 5:2510; Termination of Seniority 6:1200; Management Rights 5:0000.

CIRCUMSTANCES: The grievors are regular part-time nurses. They applied for, but were not awarded two temporary full-time nursing positions. One of these positions went to a casual nurse, who has no seniority. The other position was split into extra shifts for the grievors. The collective agreement obliges the employer to hire on the basis of seniority where skills, etc. are equal. That is not at issue here as the grievors clearly had seniority and are at least as well qualified.

The employer argues that a nurse who moves from a regular part-time position to a temporary position loses all accumulated seniority and rights. The grievors were unwilling to accept this as a precondition. The employer argues as well that it has a broad mandate to direct the workplace, and that it has acted reasonably.

The union responds by arguing that the relevant clause on temporary nurses does not apply to nurses already on staff who move from regular part-time to temporary full-time positions. The union relies on the presumption against loss of seniority rights in its arguments, and on the fact that there is nothing in the provisions relating to loss of seniority which can apply to the present situation.

AWARD: The grievance succeeds. The article on temporary nurses refers to nurses being "hired" for a designated minimum period. It is held not to apply to those already in the bargaining unit who perform temporarily in some capacity other than their regular position. While it provides a temporary nurse shall not accumulate seniority, it nowhere purports to remove previously earned seniority. While resignation leads to loss of seniority, this is interpreted as resignation from employment, not from a particular position within the bargaining unit.

The employer's second argument fails because it is obliged by the collective agreement to post and fill vacancies in a prescribed procedure. It has clearly not done so in the present case.

The issue of compensation is remitted to the parties at their request. The arbitration retains jurisdiction to deal with the matter if the parties are unable to negotiate a settlement.

DECISION: 86-49

Town of Wolfville **AND** Wolfville Police Association, Local 209 of Police Association of Nova Scotia

Peter E. Darby, Chairman; Charles MacDougall; Alan Tufts

Bruce W. Evans, for the union
Derrick J. Kimball, for the employer
April 30, 1986

ISSUES: Time Limits - Delay 2:3210; Mandatory or Directory 2:3128, Relief Against Non-Compliance 2:3140, Restriction on Arbitrability 2:1100; Retroactivity 4:1610.

CIRCUMSTANCES: The merits of this grievance raised the issue of which of two dates was the grievor's anniversary date for the purpose of receiving wage increases. The earlier date was the date of the grievor's temporary full-time appointment; the later date was the date of permanent full-time appointment.

The employer raised a preliminary objection with regard to the union's failure to comply with the mandatory time limits set in a collective agreement signed by the parties during the grievance procedure. The union did not attempt to bargain for an exception to these limits for this grievance. Further, the employer argues that even if the mandatory time limits do not bar the grievance, the union has failed to comply with the chronological order of proceedings set out in the grievance procedure. The union argues that to apply the mandatory time limits retroactively would be unfair; the employer argues the union could and should have preserved its right to pursue the grievance during negotiations for the new collective agreement.

AWARD: The preliminary objection succeeds; the merits of the grievance are not discussed. The mandatory time limits set by the new collective agreement are applicable; further, the directory time limits of the preceding collective agreement would also bar the grievance as the delay has been prejudicial to the employer. The union knew of the new mandatory provision regarding time limits, and could have sought to exempt this grievance from the retroactive application of the collective agreement. The union did not comply with the directory time limits or procedure set by the preceding collective agreement; it did not seek to preserve its rights under the new agreement, nor did it seek to negotiate a definition of 'service'.

DISSENT (MacDougall): No reasons are given.

AUTHORITIES: Re Penticton & District Retirement Service (1977), 16 L.A.C (2d) 91 (B.C.L.R.B. per P. Weiler, Chairman) at 102; Brown and Beatty, Canadian Labour Arbitration (2d ed. 1981, Canada Law Book) at pp.183-4, 97-8, 101-03.

DECISION: 86-50

Civil Service Commission AND Nova Scotia Government Employees

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Union

S. Bruce Outhouse, Arbitrator

Ronald A. Pink, for the union
Alison W. Scott, for the employer
March 17, 1986

ISSUES: Discipline and Discharge: Grounds for - Absence from Work - Failure to Notify Employer 7:3110, Alcoholism 7:3210, Criminal Charges 7:3424, Criminal Convictions 7:3422, Theft 7:3310, 7:3312, 7:3314, Just Cause 7:1200.

CIRCUMSTANCES: The grievor was absent from work without giving prior notice or receiving permission on three prior occasions, and had been warned. On June 6, 1985 the employer notified the grievor that because he had been absent from work since May 23, 1985, he was deemed to have resigned pursuant to a provision in the collective agreement which provides for deemed resignation after an absence of ten consecutive days. The grievor sought reinstatement by establishing the absence arose from a cause beyond his control. The grievor admitted to personal problems and alcoholism, which were the causes of the absences. At this meeting, other issues were raised concerning invoices. Following the meeting the employer conducted an investigation into the grievor's absences, and the invoices. The employer concluded that alcoholism caused or contributed to the grievor's absences. He also concluded that the grievor was guilty of misconduct. On July 17, 1985, the grievor was dismissed for cause, effective May 22, 1985. Criminal charges of theft and fraud were laid. The grievor was acquitted of theft on the finding of the trial judge that the Crown failed to prove criminal intent beyond reasonable doubt. The grievor was found guilty of fraud, fined and ordered to pay restitution. The grievor seeks reinstatement from both the deemed resignation and the discharge for cause.

AWARD: The discharge for cause stands. The grievor was at work on June 5, 1985, the tenth day. Although he performed an insignificant amount of work, the deemed resignation provision cannot apply. However, the grievor's misconduct has been such that the employment relationship is undermined, and any mitigating factors are outweighed by the grievor's abuse of his position. The grievor is discharged for cause. The arbitrator retains jurisdiction to deal with any question of compensation which may arise out of the question of effective date of discharge.

AUTHORITIES: Re Nova Scotia Liquor Commission and Nova Scotia Liquor Commission Employees Union, Local 470 (1974), 5 L.A.C. (2d) 117 (Richard); Re Northern and Central Gas Corp. Ltd. and Local Steelworkers Local 7356 (1977), 16 L.A.C. (2d) 395 (O'Shea); Re Bell Canada and Communications Union Canada (1979),

22 L.A.C. (2d) 6 (Kennedy); Re British Columbia Hydro and Power Authority and International Brotherhood of Electrical Workers, Local 258 (1984), 17 L.A.C. (3d) 113 (Thompson): Re William R. Barnes Company Limited and General Truck Drivers' Union, Local 879 (1973), 2 L.A.C. (2d) 284 (Brown); Re Ford Motor Co. of Canada Ltd. and United Automobile Workers, Local 1520 (1973), 3 L.A.C. (2d) 166 (Weatherill); Re Canadian Broadcasting Corporation and Canadian Union of Public Employees (1979), 23 L.A.C. (2d) 227 (Arthurs); Re Goodyear Tire Inc. and United Rubber Workers, Local 232 (1985), 18 L.A.C. 65 (Burkett).

DECISION: 86-51

The Nova Scotia Government Employees Union **AND** Civil Service Commission.

Professor Peter E. Darby, Chairman; Eric Durnford; Cathy Lace

Ronald A. Pink, for the union
Jonathan Davies, Reinhold M. Endres, for the employer
April 22, 1986

ISSUES: Procedure - Preliminary Objections 3:2100; Arbitrability - Procedural Limitations - Policy and Individual Grievances 2:1100, 2:3120, 2:3124; Grievance - Policy Grievance 2:3120, 2:3124.

CIRCUMSTANCES: This is a policy grievance brought by the union alleging that the employer contravened sections of the collective agreement by implementing its governmental policy on sexual harassment.

The union and the employer were negotiating an agreement that included provisions relating to sexual harassment. Aware that the government was planning a policy on this subject, the union was assured it would be consulted about the policy before it was implemented. The union executed the agreement with the employer. However, the policy was implemented without consultation, and according to the union, infringes upon articles in the agreement.

AWARD: The grievance succeeds. There is a preliminary objection by the employer to the Board's jurisdiction to hear a policy grievance where no actual dispute is involved. The Board dismisses this on the grounds that it is appropriate to deal with issues that will aid in avoiding disputes as well as resolving them. No actual "event" is necessary.

On the merits of the grievance, the majority finds, with reluctance, that the Policy does infringe upon areas covered by the agreement. The Policy is directed at more than just a management disciplinary right. It language and its provisions

indicate that it is intended to redress situations involving sexual harassment, and this puts it into conflict with articles of the agreement. Two other matters, concerning representation of the victim and timeliness of grievances, are also considered and found to be inconsistent with the agreement.

AUTHORITIES: Brown, D. J. and Beatty, D. M., Canadian Labour Arbitration (2nd ed. 1984, Can. Law Book Co.), pp. 90-94; Palmer, E.E. Collective Agreement Arbitration in Canada (2nd ed. 1983, Butterworth's), pp. 175-185; Re United Electrical Workers, Local 505 and International Silver Co. of Canada Ltd. (1964), 14 L.A.C. 298; Goodyear Tire & Rubber Co. of Canada Ltd. (1973), 2 L.A.C. (2d) 438; McKellor General Hospital and Ontario Nurses Association (August 24, 1984) (unreported); Re Royal Ontario Museum (1983), 12 L.A.C. (3d) 207, 217; Re Religious Hospital of Hotel-Dieu of St. Joseph of the Diocese of London (1983), 11 L.A.C. (3d) 151; Re Iron Ore Company of Canada (1983), 11 L.A.C. (3d) 53; Re British Columbia Railway Co. (1982) 8 L.A.C. (3d) 250; Re Canadian Broadcasting Corporation (1973) 4 L.A.C. (2d) 263; The Nova Scotia Nurses' Union (Fleet) and Dartmouth General Hospital and Community Health Centre (Nov. 30, 1984) (unreported); K.V.P. Co. Ltd. (1965), 16 L.A.C. 83; Brown & Beatty, Supra, pp. 179-183; Re Metropolitan Toronto Board of Commissioners of Police and Toronto Metropolitan Police Association et al. (1981), 124 D.L.A. (3d) 684 (Ont.C.A.); Nova Scotia Nurses' Union (Infirmary Local) v. Halifax Infirmary Hospital (1983), 53 N.S.R. (2d) 289 (N.S.S.C.A.D.); The American Heritage Dictionary of the English Language (1969, Houghton Mufflin Co.), p.1092, p.375, p.1090; Brown and Beatty, supra, pp. 180-1; Nova Scotia Government Policy Concerning Sexual Harassment.

DECISION: 86-52*

Nova Scotia Civil Service Commission **AND** Nova Scotia Government Employees Union

Hon. Mr. Justice C. Denne Burchell

R.A. Pink and Kimberly H. W. Turner, for the union
A. Scott, for the employer
April 30, 1986

ISSUES: Job Classification and Descriptions - Change of Work Load/Job Function 5:2410, Wage Structure 5:2420; Management Rights 1:2000 - Wage Rate for New Classification 8:1000; Arbitrability - Subject Matter Limitations 2:1100; Judicial Review 1:5100 - Grounds for Review - Error of Law on Face of Record 1:5400, Excess of Jurisdiction 1:5300, Standard of Review of Arbitral Interpretation 1:5400, Certiorari 1:5100.

CIRCUMSTANCES: In this application to the Supreme Court, Trial Division, the employer (applicant) seeks an order in the nature of certiorari to quash an award made at arbitration. The award arose out of a grievance brought by the union (respondent) on behalf of three registered nurses. Each had been performing duties which the adjudicator determined to be of higher paying job classification than that assigned by the employer. The employer argues that the adjudicator exceeded his jurisdiction and committed errors of law in reclassifying the jobs; it claims that the right to classify is solely reserved for management by the collective agreement.

AWARD: The application is dismissed. The court does not accept the employer's argument that job classification is not an arbitrable issue. The adjudicator did not commit an error of law in dealing with the grievance and did not exceed his jurisdiction in making the award. His findings were based on the circumstances before him, and both these findings of fact and his interpretation of agreement and statute were reasonable and should not be overturned.

AUTHORITIES: Southern Electric Ltd. v. International Brotherhood of Electrical Workers, 66 N.S.R. (2d) 159; Acadia University v. International Union of Operating Engineers (1985), 66 N.S.R. (2d) 296; Civil Service Bargaining Act, S.N.S. 1978, c.3; Civil Service Act, S.N.S. 1980, c.3.

*See summary of arbitration award: 86-15

DECISION: 86-53

The Town of New Glasgow **AND** The New Glasgow Police Association, Local 103 of the Police Association of Nova Scotia

R. Lorne MacDougall, Chairman; Charles A. MacDougall, John K. Lynn

Bruce W. Evans, for the union
Bruce T. MacIntosh and James Langille, for the employer
April 29, 1986

ISSUES: Pyramiding of Benefits 8:2140, 8:3330; Call-in Pay 8:3410; Interpretation - Intention of the Parties 4:2100; Evidence - Burden of Proof 3:2400 - Applications - Call-in Pay 3:2418, Damages 3:2412.

CIRCUMSTANCES: The grievor, a police sergeant, was injured while on duty. Unable to carry out his regular work, he received Workmen's Compensation benefits supplemented to salary equivalent. During the time he was receiving compensation, the grievor completed 30 hours of court preparation and attendance.

The employer had to reimburse the Workers' Compensation Board for these hours. The grievor argues that by the collective agreement he is entitled to full salary and payment for court preparation and attendance, whereas he has received only regular hourly wages for the time. He claims damages for lost benefits, plus interest.

AWARD: The grievance succeeds in part. The majority finds that the grievor has failed to satisfy the burden of proving that the relevant provision of the agreement applies. He has not shown he was entitled to Worker's Compensation during the 30 hours, a requisite to coverage by the sections of the agreement in question. However, as other sections are applicable, he succeeds to the extent that he is entitled, additionally, to time and one-half for the hours spent in court preparation.

DISSENT (MacDougall): The grievor is entitled to full benefits, including salary and pay for court work. In this interpretation the circumstances do not prohibit the operation of all sections of the collective agreement.

DECISION: 86-54

Underground Services (1983) Limited **AND** The Labourers International Union of North America, Local 615.

R. Lorne MacDougall, Q.C.; Arbitrator

Gordon Forsyth, for the union
Brian Johnston, Sara Filbee, for the employer
May 21, 1986

ISSUES: Contracts of Employment - Collective Bargaining Pre-empts 2:1200, Consistent with Collective Agreement 2:1200; Interpretation - Statutes 4:2230; Statutes - Applied by Boards of Arbitration 2:2100; Bargaining Unit - Geographical Boundaries 5:1110; Labour Relations Act - Jurisdictional Disputes 2:3110.

CIRCUMSTANCES: The union alleges that the employer violated terms of a collective agreement, by which it was bound, between the Construction Association Management Labour Bureau and the union, by employing non-union labourers to carry out work in mainland Nova Scotia for a unionized corporation. Under previous ownership, the employer had signed an agreement with the Bureau that was restricted in operation to Cape Breton and to specific job sections. When the new owners resigned, the form erroneously omitted these restrictions. The employer claims it was not bound by the agreement.

AWARD: The grievance is dismissed. The Board finds that the employer is not bound by the agreement through its relationship

with the Bureau. For the employer to be bound it must be shown that it is a "unionized employer", as the Trade Union Act (s.89, s.94(7)) so restricts the Bureau's representational authority. As the union has not been certified according to s.92, it must prove that the employer has "voluntarily recognized" it as the employees' bargaining agent (s.28). The Board does not accept the union's argument that the employer assigned its bargaining rights to the Bureau and thereby became a unionized employer. This agency theory is not a valid voluntary recognition substitute. Neither is it accepted that the employer was bound as successor to the agreement, because it was not required to comply beyond specified geographical and sectorial restrictions.

The employer can only be bound as far as the statute allows, and as neither certification nor voluntary recognition has been proved, the employer is not a "unionized employer" and is not bound by the Bureau's representation.

AUTHORITIES: International Brotherhood of Electrical Workers, Local 625 and Rocca Construction Limited (1978) (unreported); Labourers International Union of North America, Local 527 and Paul D'Aoust Construction Limited and Ottawa Construction Association (Decision of the Ontario Labour Relations Board) 1976; Trade Union Act s.28, s.89, s.92, s.94(7), s.95(1), s.97(1).

DECISION: 86-55

Nova Scotia Liquor Commission **AND The Association of Commercial and Technical Employees, Local 1670**

Bruce Outhouse, Arbitrator

Blaise MacDonald, for the union
James Leefe, Q.C., for the employer
May 16, 1986

ISSUES: Discipline and Discharge - Burden of Proof 3:2411, 7:2300; Evidence - Burden of Proof 3:2411, 7:2300; Standard of Proof 3:2500, 7:2500; Grounds for 7:3000; Leaving Work Without Permission 7:3310; Untrustworthiness 7:3330; Just Cause 7:1200, Theft 7:3310; Disciplinary Penalties 7:4000 - Types of Penalties - Demotion or Transfer 7:3544; Credibility 3:5100; Promotion, Demotion and Transfer - Burden of Proof 7:2300, Demotion or Transfer - Disciplinary 7:3544, Reasonableness 6:3100.

CIRCUMSTANCES: The grievor was demoted, indefinitely, from manager to clerk in one of the employer's stores. He seeks reinstatement with full compensation. Alternatively, the union argues that the demotion should be of specific duration. The

employer claims the grievor was demoted for just cause, in accordance with the collective agreement. He allegedly committed acts of gross misconduct which justified this disciplinary action, including: stealing, acting in collusion with a bootlegger; disregarding official policy; and being absent from work during scheduled shifts.

AWARD: The grievance is dismissed. The employer is justified in removing the grievor and is not required to make the demotion of fixed duration. The decision rests mainly on a determination of factual issues. The Board finds that the evidence satisfies the employer's burden of proof. Witnesses, standards of reasonableness, and the grievor's own lack of credibility show that in the balance of probabilities, the grievor committed acts which seriously breached the trust necessarily bestowed on him as manager. In such circumstances an indefinite demotion is an "appropriate disciplinary response" and there is not applicable authority to support substitution of a set time period.

AUTHORITIES: Re District of Kitimat and Canadian Union of Public Employees, Local 707 (1980), 26 L.A.C. (2d) 316; Re International Chemical Workers, Local 721 and Brockville Chemical Industries Limited (1971), 23 L.A.C. 336; Re Consumers Glass Co. Ltd. and United Glass and Ceramic Workers, Local 200 (1976), 12 L.A.C. (2D) 40; Re MacDonnell (unreported); Teamsters, Chauffeurs, Warehousemen & Helpers, Local 927 and Twin Cities Co-operative Diary Limited (November 30, 1982) (unreported); Re Wood (September 20, 1984) (unreported).

DECISION: 86-56

Boyd and Garland Construction Limited **AND** International Union of Operating Engineers, Local 721

Judge J. A. MacLellan, Arbitrator
Edgar Doull, for the union
Terry Roane, for the employer
June 4, 1986

ISSUES: Collective Agreement: Binding Effect - Determination of 4:0000; Arbitrability - Agreement as Primary Source of Jurisdiction 2:3110.

CIRCUMSTANCES: Non-union employees were hired by three of the employer's sub-contractors. The union argues that this is a breach of provisions contained in a collective agreement between itself and the Construction Association Management Labour Bureau. The union claims the employer is a member of the Bureau and is therefore bound by the agreement. The employer argues that it does not have employer status, that it was not an employer of operating engineers, that it had no intention to assign

bargaining rights as regards operating engineers to the Bureau, and finally that any obligations the company may have had under the collective agreement have been cancelled by a new collective agreement.

AWARD: The grievances succeed. The employer is an employer within the meaning of s.89(f) of the Trade Union Act. Further, s.89(f) does not specify any particular trade. The employer assigned its bargaining rights as regards operating engineers to the Bureau in its application membership form and collective bargaining authorization form, although it has never employed an operating engineer. The employer continues to be bound so long as the accreditation order remains in effect. The employer is bound by the term of the present collective agreement. The arbitrator retains jurisdiction to deal with the question of damages if the parties cannot reach agreement.

DECISION: 86-57

Cape Breton District School Board **AND** Nova Scotia Teachers' Union

Michael B. Sherar, Arbitrator

R.J. Downie, for the grievor
Charles Broderick, for the employer
May 28, 1986

ISSUES: Procedure - Notice 3:1210; Discipline and Discharge: Grounds for -Alcoholism 7:3210; Disciplinary Penalties: Mitigating Factors - Rehabilitative Potential 7:4428, Remedial Program 7:4422.

CIRCUMSTANCES: The grievor was suspended from teaching duties as of October 11, 1985 to the end of the 1985/86 school year after being intoxicated in class. This was the first incident before a class, but not the first incident involving alcohol. The grievor admits to having been an alcoholic but has completed an alcohol rehabilitation program in January 1986 and has remained sober since.

The grievor was initially suspended for ten days without pay effective October 11, 1985. The grievor received notice of a meeting of the School Board on October 23; however this did not state the grievor could attend this meeting or be represented. At this meeting it was decided to suspend the grievor to the end of the school year. The employer considered the grievor to be at 'stage three' in its Alcohol and Drug Rehabilitation Program and suggested the grievor seek rehabilitation. This suspension was confirmed after a meeting on November 4 which the grievor and counsel attended.

Counsel for the grievor argues that the grievor received insufficient notice of the meeting of October 23, 1985. Counsel also argues that the employer cannot suspend an employee for alcohol abuse as it has agreed to a mandatory alcohol rehabilitation program with a set procedure.

AWARD: The grievance succeeds on substantive grounds. The notice received of the meeting of October 23, 1985 was negligently drafted. The decision of October 23, 1985, to suspend to the end of the school year, is therefore invalid. The hearing on November 4, however was fair and meaningful and fulfills the procedural requirements.

The employer has agreed to an Employee Assistance Program for alcohol and drug rehabilitation. Alcohol and drug abuse are recognized as diseases. The employer cannot exercise any of its ordinary disciplinary powers with respect to alcoholism except as contemplated by the Alcohol and Drug Rehabilitation Program.

The grievor's conduct was a manifestation of alcoholism; the grievor must therefore be dealt with as the Alcohol and Drug Rehabilitation Program provides. The suspension is revoked.

The grievor must show damages. As alcoholism is considered an illness, rehabilitation time should be considered as sick leave used for seeking necessary medical treatment. The grievor is to be reinstated as of October 10, 1985, and to have sick days debited from accumulated sick leave until February 28, 1986, one month after completion of the rehabilitation program and a reasonable time to expect the grievor to have been able to return to work. The grievor is to receive full salary, benefits, seniority, etc. from March 31, 1986 on. The grievor is cautioned that the opportunity for rehabilitation as provided by the Alcohol and Drug Rehabilitation Program has been used, and continued employment depends on the grievor's maintenance of teaching skills to the reasonable standard expected by the employer.

AUTHORITIES: Professor M. Allen, Administrative Law (Carswell Co., 1973) at p.64; Brown and Beatty, Canadian Labour Arbitration, 2nd ed., paras. 7:2400 and 7:2500, and at p.368; Re Jones and The Queen in the Right of New Brunswick (1980) 27 L.A.C. (2d) 184 (Kutler) quashed 34 N.B.R. (2d) 233, 34 N.B.R. (2d) 211 sub nom Jones and New Brunswick Teachers Federation v. Province of New Brunswick, (C.A.) leave to appeal to S.C.C. refused 36 N.B.R. (2d) 359; Motor Transport Industrial Relatives Bureau of Ontario (1973), 4 L.A.C. (2d) 154.

DECISION: 86-58

Canso Sea Products Limited AND United Food and Commercial Workers

International Union, Local 1252

Bruce Outhouse, Arbitrator
Reg Anstey, for the union
Mark MacDonald and Nancy Murray, for the employer
June 2, 1986

ISSUES: Discipline and Discharge: Grounds for - Damage to Employer's Property 7:3410; Evidence - Circumstantial Evidence 3:5100, Weighing the Evidence 3:5100, Standard of Proof-Discipline Cases 7:2500.

CIRCUMSTANCES: The grievor was dismissed by the employer because it believed he had sabotaged one of its vessels by putting salt into the lubricating oil system while the vessel was at sea. There is no direct evidence to indicate which of the crew was responsible for the sabotage. The grievor denies the allegation.

With the exception of the grievor, all of the crew have taken a lie detector test at the employer's request. In the opinion of the test administrator, none of those who took the test put the salt in the fill pipe or know who did. The employer concluded the grievor was guilty as the other crew members are believed to be innocent. The employer also has a circumstantial argument that the grievor had a motive in that he wished the vessel to be in port longer than was scheduled so that he could visit his mother. The employer argues it was justified in dismissing the grievor. The union argues that the employer has not proved the grievor committed sabotage.

AWARD: The grievance is denied. All of the other crew members testified at the hearing that they did not put salt into the fill pipe or know who did. The employer's evidence constitutes a prima facie case against the grievor. The grievor did not testify; he failed to rebut this prima facie case. A negative inference must be drawn against the grievor; the employer is justified in summarily dismissing him.

AUTHORITIES: Re Canadian Pacific Hotels (Le Chateau Champlain) and Canadian Brotherhood of Railway, Transport and General Workers, Local 300 (1983), 7 L.A.C. (3d) 100 (Frumkim); Civil Service Commission and the Nova Scotia Government Employees Union (January 2, 1984), unreported (Darby); Re Dalton Cartage Company Limited v. The Continental Insurance Company and St. Paul Fire and Marine Insurance Company (1982), 40 N.R. 135 (S.C.C.); Re Air Canada and International Association of Machinists and Aerospace Workers (1978), 7 L.A.C. (2d) 337 (Christie); Re Dominion Stores Ltd. and Retail, Wholesale and Department Store Union, Local 414 (1976), 12 L.A.C. (2d) 131 (O'Shea); Phillion v. the Queen (1977), 74 D.L.R. (3d) 136 (S.C.C.); Re Canada Post Corporation and Canadian Union of Postal Workers (1982), 8 L.A.C. (3d) 60 (Burkett); Re Government of the Province of Alberta and Alberta

Union of Provincial Employees (1983), 8 L.A.C. (3d) 1 (Jolliffe); Re Kingsway Transports Ltd. and Teamsters Union, Local 938 (1983), 10 L.A.C. (3d) 440 (Brandt); Regina v. Beland and Phillips (1984), 15 D.L.R. (4th) 89 (Que. C.A.); Prince v. Home Insurance Company (1985), 61 N.B.R. (2d) 170 (N.B.C.A.); Re Corporation of the Regional Municipality of Haldimand-Norfolk (Grandview Lodge) and Health, Office and Professional Employees, Local 206 (1985), 20 L.A.C. (3d) 131 (Samuels); James William Smith v. Her Majesty the Queen (November 15, 1985), unreported (N.S.S.C., App.D.); Re International Harvest Co. of Canada Ltd. and United Automobile Workers, Local 127 (1974), 5 L.A.C. (2d) 290 (Hinnegan); Re Douglas Aircraft Co. Ltd. and United Automobile Workers, Local 1967 (1976), 13 L.A.C. (2d) 410 (Gorsky); Re University Hospital and London and District Building Service Workers' Union, Local 220 (1977), 16 L.A.C. (2d) 38 (Simmons); R. V. Milne, Lawyer Weekly, vol. 6, no. 4 (May 23, 1986) (O.S.C.); Labourers' International Union of North America, Local 183 c. Olympia and York Developments Ltd. (1986), 86 C.L.L.C. para. 16, 025 (Akella); Ontario Employment Standards Act; Nova Scotia Labour Standards Code; Nova Scotia Trade Union Act.

DECISION: 86-59

Cape Breton District School Board AND Canadian Union of Public Employees, Local 781

Judge Robert F. Ferguson, Arbitrator

Kevin MacNeil, for the union
Charles Broderick, for the employer
June 6, 1986

ISSUES: Skill and Ability - Arbitral Review 6:3100, Senior Employee with Required Ability 6:3210.

CIRCUMSTANCES: As the result of an earlier grievance, a position for which the grievor had applied was re-posted. The position was awarded to the incumbent, who began employment after the prior improper job posting. The incumbent was not previously a union member. The union argues firstly that the collective agreement requires the employer to consider union applicants before outside applicants, which, it argues, is the incumbent's status. The union also argues that the grievor, as an employee with the required ability, should receive the job. If the incumbent is considered an internal applicant, the grievor has seniority and should receive the job.

AWARD: The grievance is denied. The arbitrator is satisfied that the grievor's application was processed before that of the incumbent, and that if the employer had determined the grievor to

be qualified, he would have had priority. Based on his past work record, work attitude and poor performance the employer did not consider the grievor qualified at the necessary 'threshold' level. The selection procedure was fair and did not violate the collective agreement.

AUTHORITIES: Brown & Beatty, Canadian Labour Arbitration at p.297.

DECISION: 86-60

Town of Westville AND Westville Police Association, Local 206 of the Police Association of Nova Scotia

S. Bruce Outhouse, Chairman; John K. Lynn; Charles A. MacDougall

Bruce W. Evans, for the union
Bruce T. MacIntosh, for the employer
June 9, 1986

ISSUES: Employee: Temporary, Casual and Part-Time 5:1124; Interpretation: Words and Phrases - Temporary 5:1124; Wages-Compliance with Wage Structure 5:2400.

CIRCUMSTANCES: The grievor is a 'part-time' employee. His position essentially that of being on-call, available to fill-in as needed for regular employees. He has worked for the employer for several years. The grievor seeks to be paid at a rate consistent with his years of service, and for a retroactive increase. He claims the salary differential and interest. The employer argues that the grievor is a temporary employee within the meaning of the contract and as such is entitled only to the wages provided for temporary employees. The employer also argues that the failure to comply with the time limits of the grievance procedure limits the grievor to declaratory relief only vis-a-vis the claim for a retroactive wage differential.

AWARD: The grievance is dismissed. The grievor is a temporary employee as contemplated by the collective agreement. The rate of pay for temporary employees set by the agreement does not require any increase with length of service.

DISSENT (MacDougall): Temporary employment is interpreted as permanent employment with temporary intervals. Such employees are hired at the specified salary, but can progress up the salary scale as length of service increases.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration (2d ed.) at 562; Re Town of Stellarton and Stellarton Police Association, Local 305 (April 21, 1983), unreported (MacDougall).

are hired at the specified salary, but can progress up the salary scale as length of service increases.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration (2d ed.) at 562; Re Town of Stellarton and Stellarton Police Association, Local 305 (April 21, 1983), unreported (MacDougall).

DECISION: 86-61

Camp Hill Hospital **AND** Public Service Alliance of Canada

Innis Christie, Arbitrator

Catharine Rogers, for the union
D. A. McKillop, for the employer
June 16, 1986

ISSUES: Discipline and Discharge: Grounds for - Falsification of Records 7:3324; Company Rules - Good Faith 4:2300.

CIRCUMSTANCES: The employer placed a record of verbal reprimand on the grievor's file for falsification of an 'Absence Report Form'. On the form the grievor stated he had been confined to his home and had not left it on the "day" in question. He was seen away from his home by his supervisor after the time his shift ended. After initially denying this, the grievor admitted that he had driven his wife to and from her place of work, but that this occurred outside of his regular working hours. The union seeks to have the reprimand removed from the grievor's record; it argues firstly that the grievor did not intend to falsify the form, and that the employer cannot properly inquire about the grievor's activities outside of his regular working hours.

AWARD: The grievance is dismissed. The grievor's initial denial of the allegation is consistent with an attempt to cover-up a wrong doing. The arbitrator concludes the grievor falsified the form. The arbitrator also concludes that the employer had a legitimate and proper business interest as to whether the grievor left his home related to the administration of its sick pay arrangements. The employer is entitled to this information even though it involves time outside the grievor's regular working hours. The verbal reprimand was justified.

AUTHORITIES: Canadian Fram Ltd. (1973), 3 L.A.C. (2d) 94 (Hinnegan); Corporation of the City of North York (1984), 17 L.A.C. (3d) 31 (Solomatenko); Bell Canada (1984), 16 L.A.C. (3d) 396 (P.C. Picher, Chairman); Nova Scotia Association of Health Organizations (Dartmouth General Hospital) and C.B.R.T. and G.W.U., Local 606 (1980) unreported (Outhouse, Chairman) citing Pacific Press Limited (1977) 15 L.A.C. (2d) 113 (Thompson) at 116.

DECISION: 86-62

Berwick Bakery AND Bakery, Confectionery and Tobacco Workers' International Union, Local 446

J. A. MacLellan, Chairman; Fern Tardif; Robert A. Cook

Rene Quigley, for the union
Matthew J. McPherson, for the employer
June 17, 1986

ISSUES: Employee - Temporary, Casual and Part-time 5:1124; Past Practice 3:4430; Insurance and Welfare Plans - Entitlement to Benefits 8:3320.

CIRCUMSTANCES: The grievors are all 'part-time' employees in the sense that they work for the employer for part of the year, and are on lay-off for the balance of the year. All of them worked in excess of six months in 1985. The collective agreement provides for payment of the unused portion of sick leave "for each full calendar year" to employees who have completed "six months of work". This payment is usually made in December. The employer argues the relevant section does not provide sick leave for those employees who have not worked a full calendar year. It has chosen to give the grievors a pro-rated payment based on the time actually worked. The employer argues this is consistent with its past practice. The union argues that as the grievors worked in excess of six months they are entitled to the same benefit as other employees as there is nothing in the collective agreement which gives the employer authority to prorate sick leave.

AWARD: The grievance succeeds. The past practice is seen as inconsistent. There is no authority to prorate or distinguish between the grievors and the full-time employees. The wording of the clause is clear.

DISSENT (Cook): The grievance should be dismissed. Past practice has been to treat part-time and full-time employees differently. The relevant provision of the agreement refers to "full calendar year". This is an ambiguous term, but based on the past practice, it is interpreted as being full calendar year worked. 'Part-time' employees are required to earn benefits prior to receiving them; full-time employees may use benefits they are expected to earn before they have actually accrued.

DECISION: 86-63

Board of Governors University College of Cape Breton **AND** University and College Staff Union

Charles O'Connell, Chairman; Mr. Gilbert MacIntyre; Mr. Robin Campbell

Reeves Matheson, for the union
Bernard Boudreau, for the employer
June 17, 1986

ISSUE: Withdrawal 2:3230.

CIRCUMSTANCES: The union grieved that the employer had violated the grievance procedure set out in the collective agreement. On June 16, 1986 the union made a motion to withdraw its grievance.

AWARD: In light of the acceptance of the union's motion, its grievance is dismissed.

DECISION: 86-64

Nova Scotia Power Corporation **AND** International Brotherhood of Electrical Workers, Local 1928

Peter E. Darby, Arbitrator

General J. McConnell, for the union
Terry L. Roane, for the employer
June 19, 1986

ISSUES: Pyramiding of Benefits 8:2140; Working Hours and Shifts - Paid Breaks 8:3700.

CIRCUMSTANCES: The grievances arise out of the employer's failure to provide the grievors with meal chits (of a value of $6.75 each) when they had worked in excess of one hour of overtime as a continuation of their regular day's work. The employer has paid the grievor's overtime pay for the time worked, an hour's regular pay for the meal 'missed' as a consequence of the overtime, and can produce receipts from the grievors' board and lodging expenses for the 'missed meal'. As it is already paying for the 'missed meal', by virtue of having to pay board and lodging expenses, the employer argues that for it to issue meal chits amounts to a pyramiding of benefits.

AWARD: The grievances succeed. According to the clear language of the contract the grievors are entitled to meal chits as well as board and lodging. It is not possible to determine the clear purpose of meal chits from Article 12.1(k), therefore to deny the grievors would involve altering or supplementing the contract made by the parties.

AUTHORITIES: D. J. Brown & D. M. Beatty, Canadian Labour Arbitration (2nd. ed. 1984 Canada Law Book Co.) at p.549 et seq.; E. E. Palmer, Collective Agreement Arbitration in Canada (2nd ed. 1983 Butterworth & Co.) at p.128 et seq.

DECISION: 86-65

Canso Sea Products Limited **AND** United Food and Commercial Workers Union, Local 1252

Bruce Outhouse, Arbitrator

William Parsons, for the union
Nancy Murray, for the employer
June 20, 1986

ISSUES: Discipline and Discharge: Grounds for - Refusal to Obey Instructions 7:3610, 7:3612; Statutory Holidays 8:3100; Call-in Pay - Purpose 8:3410; Strikes and Lockouts 9:2100; Management Rights 5:0000; Warning - Failure to Warn 7:3542, 7:4416; Statutory Holidays - Qualifying Days 8:3120; Call-in Pay-Matters Beyond Employer's Control 8:3420.

CIRCUMSTANCES: This grievance arises out of the employer's failure to pay certain employees in the trim/pack department of one of its plants holiday pay for July 1, 1985 and reporting pay for July 2, 1985 after the employer's cancellation of a shift on July 2, 1985.

The cancellation of the shift arose out of an ongoing effort by the employer to keep bathroom sheets, which kept track of an employee's time away from the production line. The employer wished the employee at the end of each production line to keep the bathroom sheet for that line. Seven employees who worked the end position and refused to keep the sheets were suspended. Their grievances are the subject of a separate proceeding. On July 2, 1985 the employer asked each production line employee in the trim/pack department to keep these sheets. Only one employee agreed to do so. As it was felt this was not sufficient for adequate control of productivity on the lines the shift was cancelled. Employees in the fish cutting department were also sent home but have received holiday pay for July 1 and reporting pay for July 2.

The union argues that as the grievors worked the regular workday preceding July 1, 1985, and reported for and were ready, willing and able to work July 2, 1985, they are entitled to holiday pay. The grievors did not refuse work. At no point were they ordered to keep the bathroom sheets, nor were they warned of the consequences of refusing to do so. The grievors are therefore

entitled to reporting pay for July 2, 1985.

The employer has four arguments as to why the grievors are not entitled to holiday and reporting pay. Firstly, it claims the refusal to keep the bathroom sheets constituted an illegal strike on July 2nd, disentitling the grievors from holiday and reporting pay. Secondly, it argues the reporting pay provisions apply to situations where there is no work. There was work on July 2nd, but because of the disruption caused by the employees it was necessary to cancel the shift. The employees did not work, therefore should not be paid.
Thirdly, the employer argues that even if no explicit orders to keep the bathroom sheets were given, the employees knew what was required and their refusal constitutes insubordination. Finally, the employer argues that the employees' behaviour frustrated the employer. It could not allow the shift to continue as to do so would place its authority to direct the work force in doubt and jeopardize productivity.

AWARD: The grievance succeeds. The grievors are entitled to holiday pay for July 1, 1985 as they worked the "regular time as required" on July 2nd. The grievors reported for work; they were not ordered to keep the bathroom sheets; no warning of the consequences of refusal was given; the grievors worked until the shift was cancelled. They are entitled to four hours reporting pay.

In response to the employer's arguments, the arbitrator found that firstly, there was no illegal strike within the meaning of the Trade Union Act as there was no cessation of work, no order to work that was refused, and no evidence of any action in concert or combination.

Secondly, the availability of work is in the employer's control. There were fish to be processed. Furthermore, the employer treated the employees in the cutting department differently, even though their shift was also cancelled. The employer must act consistently and cannot be allowed to discriminate against the employees in the trim/pack department.

Thirdly, as there was no order to keep the bathroom sheets, to refuse to do so cannot be seen as insubordination.

Finally, the refusal by employees to keep production line bathroom sheets is not a matter which so goes to the root of the contract as to frustrate the employer from carrying out its half of the agreement. Time away from the production lines may be a matter of legitimate concern but is not integral to the production process.

AUTHORITIES: Trade Union Act, S.N.S. 1972 c.19, s.1(1)(v), s.48(1)(b); Re United Electrical, Radio & Machine Workers of

America, Local 521 and Campbell Manufacturing Co. Ltd. (1947), 1 L.A.C. 143 (Wright); Re Fish International of Canada Ltd. and International Association of Bridge, Structural and Ornamental Iron Workers, Local 725 (1982), 7 L.A.C. (3d) 25 (Anderson); Re Ferguson Industries Limited and United Steelworkers, Local 4702 (1975), 8 L.A.C. (2d) 232 (Richard); Re Brotherhood of Railroad Trainmen and Pacific Great Eastern Railway Company (1968), 23 L.A.C. 293 (Weatherill); Brown and Beatty, Canadian Labour Arbitration (2nd ed.) at pp. 437-8; Re Northern Electric Company Limited and U.A.W., Local 1535 (1972), 290 L.R. (3d) 300 (Ont. Div. Ct.).

DECISION: 86-66

Valley Health Services Association **AND** Nova Scotia Government Employees Union, Local 52

Innis Christie, Arbitrator

Ronald Pink, for the union
Robert Cook, for the employer
June 23, 1986

ISSUES: Overtime 5:3200, Notice 5:3230; Working Hours and Shifts 5:3100; Pyramiding of Benefits 8:2140; Overtime - Call-in Pay 8:3410.

CIRCUMSTANCES: The grievor normally worked Monday to Friday and every fifth weekend, with the following Thursday and Friday off. On a Friday evening, the grievor was notified that he would have to work Saturday and Sunday in place of the regularly scheduled employee who was sick. According to the overtime clauses in the collective agreement, the time worked in excess of regularly scheduled shifts is to be paid at one and a half times the regular rate. Further, an employee "who is required to work overtime on his second or subsequent day of rest is entitled to double time for all hours worked". The employer argues that the overtime provisions do not apply to the Sunday because the grievor received twenty-four hours' notice as specified in the provisions for schedule changes. The grievor was given the following Friday off; he was not given a choice between time off and overtime pay. The grievor seeks overtime of double the regular rate for the Sunday worked.

AWARD: The grievance succeeds. The circumstances here argue a one-shot arrangement, not a change in shift schedules. Shift schedule changes are longer term arrangements posted at least two weeks in advance. This was a call-out to replace a sick employee. Giving the twenty-four hours' notice provision the interpretation the employer argues would lead to an inconsistent reading of the provisions for hours of work and overtime. The

employer is directed to pay the grievor double time for the hours worked on the Sunday. The arbitrator retains jurisdiction to settle any matters of compensation which the parties are unable to agree upon.

DECISION: 86-67

Eastern Drywall Acoustics Limited **AND** United Brotherhood of Carpenters and Joiners of America, Local 83

Douglas G. Ruck, Arbitrator

Ronald Pink, for the union
Jack Innes, for the employer
June 24, 1986

ISSUES: Work Assignment - Contracting Out 5:1300, Employees Outside Unit 5:1400, Remedies 5:1500.

CIRCUMSTANCES: The union claims that on two occasions at two different job sites the employer violated the collective agreement by hiring non-union workers. The collective agreement is between the union and the Construction Association Management Labour Bureau Limited. Eastern Drywall Acoustics is a member of the Bureau and bound by its contracts.

With regard to the first grievance, the employer concedes that the employee in question was non-union. However it argues that the site had been turned over to the owner, and that work on the site from then on is exempt from the collective agreement.
The second grievance involves the presence of two non-union workers at a job site. The employer argues that Park Construction, a non-union company, was in fact the employer at that job site. Both companies share the same principal. The original work order for Eastern Drywall was cancelled and a second was issued to Park Construction. The union argues this was done to avoid the employer's obligations to the union.

AWARD: The first grievance is upheld, the second is dismissed. The employer is required by the collective agreement to follow a hiring process. The employer's obligation to use union workmen is not dependent on who is in charge of the worksite.

The second grievance is dismissed as the arbitrator accepts the evidence of the principal of Eastern Drywall and Park Construction. The change was made for bona fide reasons; as a non-union employer Park Construction was not in violation of the collective agreement.
The union is awarded damages equal to the lost wages for the first grievance. The arbitrator reserves jurisdiction to hear evidence on the amount involved if the parties are unable to

agree.

AUTHORITIES: Labourers' International Union of North America, Local 615 and United Brotherhood of Carpenters and Joiners of America, Local 1392 and Landing Construction Limited and D. J. Floyd Construction Limited (N.S.S.C.A.D. No. 01473).

DECISION: 86-68

Sydney Steel Corporation **AND** United Steelworkers of America, Local 1064

Peter E. Darby, Arbitrator

Benjamin O'Neill, for the union
Eric Durnford, for the employer
June 26, 1986

ISSUES: Overtime - Right to Claim 5:3220; Management Rights 5:0000.

CIRCUMSTANCES: A roll turner was assigned to load a set of blooming mill rolls into a railway flatcar. The grievor, a crane operator, claims this work should have been assigned to him as overtime. The grievance claims the employer violated the collective agreement, however no specific provision is cited.

AWARD: The grievance is dismissed. There is nothing in the collective agreement or other documents submitted which support the grievor's claim to overtime for this job. The employer has the right to make temporary assignments and to determine whether or not to order overtime.

AUTHORITIES: D. J. Brown & D.M. Beatty, Canadian Labour Arbitration, (2nd ed., 1984, Canadian Law Book) at p.256.

DECISION: 86-69

Nova Scotia Power Corporation **AND** International Brotherhood of Electrical Workers, Local 1928

Claude H. Foisy, Arbitrator

Mr. Gerald J. McConnell, for the union
Mr. Gregory I. North and Ms. Terry L. Roane, for the employer
June 26, 1986

ISSUES: Overtime - Scheduling 5:3100, 5:3200; Working Hours and Shifts 5:3100; Management Rights - Overtime 5:3210.

CIRCUMSTANCES: The grievors are part of a maintenance crew at the Lingan coal-fired generating plant. Their regular working hours, as set by the collective agreement, are for five days of eight hours, Monday to Friday 7:30 a.m. to 4:00 p.m. On a Friday, the grievors were notified that their hours were being rescheduled to work 11:00 p.m. to 7:30 a.m. on the immediately following Sunday and Monday. This re-scheduling was ordered to allow for repair of a mill when the adjacent mill could also be shut down, in accordance with a recommendation of the joint safety committee. As the plant cannot generate its full load of electricity with two mills shut down, it was decided to schedule the repair work for the back shift. The grievors worked 11:00 p.m. Sunday to 7:30 a.m. Monday. Three of the grievors claimed the right to work their regular hours 7:30 a.m. to 4 p.m. Monday and did so. All of the grievors worked 11:00 p.m. to 7:30 a.m. Tuesday. All of the grievors were notified Monday they were not required for work on Tuesday, so none of them worked their regular hours Tuesday.

The employer argues that the employees were re-scheduled to cope with an irregular situation, and that overtime is not applicable.

The union argues that the regular working hours cannot be altered except by agreement, and that any work scheduled outside those hours is overtime. The union also argues the assignment of overtime does not affect the employee's right to work the normally scheduled hours.

AWARD: The grievance succeeds. Management rights to schedule the workforce are restricted by the collective agreement which sets out a specific 'regular work week'. The agreement provides the schedule can be altered by mutual agreement of the parties. The contract provides for overtime regular as well as irregular conditions and scheduling. The employer's interpretation would circumvent contract provisions for payment of premiums when hours outside the regular hours are worked. Employees have the right to work their regular work hours if work is available. The employer is ordered to pay the grievors the salary they would have been entitled to had they worked their usual schedule. (The grievors have already been paid overtime for the two night shifts; the employer argued it had not been obliged to pay overtime however.) The arbitrator retains jurisdiction to deal with the quantum of the award if necessary.

AUTHORITIES: Canadian Pittsburgh Industries (1972), 24 L.A.C. 402 (Brown); Brown and Beatty, Canadian Labour Arbitration (2nd ed.) at para. 5:3100.

DECISION: 86-70

Town of New Waterford AND Canadian Union of Public Employees,

Local 232

David J. MacDonald, Chairman; J. Bernard Boudreau, Gilbert McIntyre

ISSUE: Innocent Absenteeism 7:3210; Illness or Disability-Effect on Employee - Ability to do Job 7:3220.

CIRCUMSTANCES: The employer discharged seven employees on long-term disability. The prognosis for each of these was that he would "never return to work", and only one of the seven had been on long-term disability for less than four years. The union argues these terminations are in violation of the collective agreement provisions on discrimination and loss of seniority.

AWARD: Six of the grievances are dismissed. The grievance of the seventh grievor, who had been on long-term disability only two months when terminated, is upheld. The Board feels that in cases of innocent absenteeism, at a certain stage an employer may make a bona fide and reasonable decision to terminate. There is no language in the collective agreement which prohibits discharge for innocent absenteeism in appropriate cases. In this collective agreement, an employee is on lay-off for two years before termination of the employment relationship. It is the opinion of the Board where an employee is on long-term disability for a two year period, and the employer has a bona fide prognosis that the employee will never return to work, that after the employer makes a fair and reasonable assessment of the situation, it may terminate the employee.

AUTHORITIES: Massey-Ferguson Limited and United Automobile Workers (1969), 10 L.A.C. 370 (Weiler); Re Niagara Structural Steel (St. Catherines) Ltd. and U.S.W. Local 7012 (1978), 18 L.A.C. 385; The Nova Scotia Government Employees Association, The Civil Service Commission, Commissioner of The Province of Nova Scotia and Tatlock (Clark); Re Russell Steel and U.S.W. (1982), 8 L.A.C. 264 at 269; Re M. T & T. and International Brotherhood of Electrical Workers (1984), 16 L.A.C. 318; Brown and Beatty, Canadian Labour Arbitration (2nd ed. 1984) at p.371, 377; 369-371; Re Manitoba Coal Limited and Alberta Strip Miners Union, Local 1595 (1984), 20 L.A.C. (3d) 58.

DECISION: 86-71

Aberdeen Hospital Commission AND Canadian Union of Public Employees, Local 741

J. A. MacLellan, Arbitrator

Richard Fogarty, for the union
Phil Veniot, for the employer

July 2, 1986

ISSUES: Discipline and Discharge: Grounds for - Absence from Work - Failure to Notify Employer 7:3110, Insolent Behavior or Obscene Language 7:3660, Prior Record 7:4310; Disciplinary Penalties: Arbitral Review - Substitution of Penalty 7:4000.

CIRCUMSTANCES: The grievor was discharged effective February 13, 1986 as a result of two incidents considered together with his past record. Since beginning employment, the grievor had an increasing number of sick days, which the employer felt fell into a sick leave abuse pattern. The grievor had previously received a one-day suspension for insubordination when he failed to produce a sick slip on request. The two incidents leading to the discharge involved a somewhat tactless scene in front of a patient, and a failure to call in sick before a regular shift. The grievor claimed that he had asked his mother to call in sick for him the previous evening when he began feeling ill; he had slept in, believing she had done so. However, she had forgotten, and by the time the grievor called it was well after the start of his shift. The grievor seeks reinstatement with full pay and benefits.

AWARD: The grievance succeeds in part. A five-day suspension is substituted for the discharge. The arbitrator accepts the grievor's explanation of the failure to call in on time. The arbitrator is not satisfied from the evidence that the grievor used improper language or was deliberately sarcastic in front of a patient. The grievor is to be reimbursed for all lost wages and benefits exempting the loss for the five day suspension and any other remuneration received by the grievor. Jurisdiction to settle the amount of remuneration to be paid the grievor in the event the parties cannot agree.

DECISION: 86-72

Cove Guest Home AND Canadian Brotherhood of Railway, Transport and General Workers, Local 620

J. B. Boudreau, Arbitrator

Thomas Barron, for the union
Warren P. MacDonald. for the employer
June 21, 1986

ISSUES: Retroactivity 4:1610, Non-monetary Items 8:1300; Time Limits - Mandatory or Directory 2:3128, Relief Against Non-compliance 2:3140; Interpretation 4:2100.

CIRCUMSTANCES: This is a policy grievance to determine the extent to which a collective agreement is retroactive. The union

argues it extends to benefits such as holidays, sick leave, overtime, etc. The employer argues it is retroactive with respect to wages only. Further, the employer argues that the union failed to comply with the time limits for filing a grievance as set out in the collective agreement.

AWARD: The grievance succeeds. As no penalties or consequences are set out for failure to comply with the time limits, they are found to be directory not mandatory. Not to grant relief for the failure to comply would be too harsh. The retroactivity article limits employees who have left the employer's employ during collective bargaining to wages only; present employees are not restricted. The retroactivity article is to be applied generally to non-monetary benefits as well as wages.
AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration at p.97; C. P. Hotels (1980), 27 L.A.C. (2d) 436.

DECISION: 86-73

Civil Service Commission AND Nova Scotia Government Employees Union

S. Bruce Outhouse, Arbitrator

Ronald A. Pink, for the union
William M. Wilson, for the employer
June 26, 1986

ISSUES: Job Posting - Fair and Reasonable 5:2520; Skill and Ability - Arbitral Review - Senior Employee if Relatively Equal 6:3220; Fairness - Job Posting 6:2310, 5:2300.

CIRCUMSTANCES: Five positions in various locations in Nova Scotia were posted and interviewed for as a group. The grievor is one of 51 persons interviewed. He had expressed interest only in the position for Truro. This position was awarded to another candidate, a new hiree without seniority, who had expressed a preference for the Halifax post, which was awarded to a third candidate. The interviews were conducted by a three-person panel. One person on this panel sat for only some of the interviews, being replaced by another person for the balance of the interviews.

The union argues that this change in the composition of the interview panel invalidates the entire interview process, and that all five positions should therefore be re-posted. Alternatively, the union argues that as the grievor is of equal qualifications to the Truro incumbent, but has seniority, the grievor should be awarded the Truro post.

The employer argues that the change in the panel does not affect

the validity of the interview process. Two of the panel members were at all of the interviews, and the remaining members were consistent in their evaluation of candidates. The assessment of the grievor should be accepted unless it can be shown to be unfair or unreasonable. In the event that a new competition is ordered, it should be restricted to Truro only.

AWARD: The grievance succeeds. The Truro and Halifax posts are to be re-posted. The awarding of the Halifax post affected the awarding of the Truro post, therefore it should be reconsidered. The change in the interview panel meant that the candidates did not receive equal treatment, as there could not be the same consistency in scoring. A new, joint competition is to be held.

The incumbents in the Halifax and Truro posts are not to be given direct credit for any experience gained in these posts. As the Halifax incumbent had no notice of this hearing, a copy of this awarded is directed to be served on him, with ten days to make representations to the arbitrator, after which time the award will become binding on all parties. The arbitrator retains jurisdiction to deal with any difficulties in the implementation of the award.

AUTHORITIES: Re N.S.G.E.U. on behalf of Judith Clayton and Civil Service Commission (August 1981) unreported; Evans v. Public Service Commission Appeal Board (1983) 1 Admin. L.R. 16 (S.C.C.); Re Rahn Metals and Plastics Limited and United Steelworkers, Local 6609 (1975) 9 L.A.C. (2d) (Fraser); Re Uniroyal Limited and United Rubber Workers, Local 80 (1978), 19 L.A.C. (2d) 278 (Brent); Re N.S.G.E.U. on behalf of Delia MacChesney et al and Civil Service Commission (February 19, 1981) unreported (Clarke); Re Hooqendoorn and Greening Metal Products and Screening Equipment Company et al (1968), 65 D.L.R. (2d) 641 (S.C.C.); Re Edwards of Canada, Unit of General Signal of Canada Ltd. and United Steelworkers, Local 7466 (1974), 6 L.A.C. (2d) 137 (Adams); Re MacMaster University and Service Employees International Union, Local 532 (1975), 10 L.A.C. (2d) 130.

DECISION: 86-74

Eastern Provincial Airways Ltd. AND National Amalgamated Local Union of Airline Workers (U.A.W.), Local 2213

Innis Christie, Arbitrator

G. T. Spencer, for the union
Karin A. McCaskill, for the employer
July 7, 1986

ISSUES: Management Rights 5:000, 4:2300; Interpretation-Intention of the Parties 4:2100.

CIRCUMSTANCES: The issues revolve around the company's handling of calling in staff to work 'open flights' - those flights that are scheduled each month after all employees have bid for their shifts for that time. The union contends that the employer's practice does not reflect the new classification system for flight attendants. Under the old agreement the classification 'Flight Attendants In-Charge' was dependant on the flight assignment. The new assignment changed this to become a characteristic of a particular employee. Two separate classes were designed 'Flight Attendants' and 'Flight Attendant In-Charge'. The employer must now fill vacancies on 'open flights' with an employee from the same classification even if it means calling someone in from a day off. The employer maintains that it is only bound to call an employee from the same classification first. It can then turn to employees from the other classification who are on a scheduled reserve-day (all-in day).

This interpretation would mean the necessity of less overtime and fewer In charge Flight Attendants. The employer also contends that the agreement binds it to call all employees on reserve first, before turning to other employees. Consequently, it is necessary to use employees from the other classification. Since those employees on reserve are paid regardless of whether they work, this interpretation is a much more efficient use of the employer's human resources.

The union argues that the new system was agreed to and the employer should be prepared to meet the extra demand to provide reserves in both classifications. The employer's actions are inconsistent with the wording of the agreement. The employer claims management rights and the fact that assignment procedures had been firmly established in practice.

AWARD: The grievance succeeds. The wording of the agreement leads to the conclusion that both parties intended to adopt a new system of classifications for Flight Attendants and Flight Attendants In-Charge. The fact that the employer's interpretation is more economic and efficient cannot be considered based on the language of the agreement and the context of the articles in question, which clearly supports the unions argument. Finding in favour of management's rights here would not be consistent with the provisions of the agreement.

DECISION: 86-75

National Sea Products Limited AND The Canadian Seafood and Allied Workers' Union, Local 101

S. Bruce Outhouse, Arbitrator

Ron Pink, for the union
Camille Cameron, for the employer
July 16, 1986

ISSUES: Discipline and Discharge - Just Cause 7:1200; Grounds for 7:3000; Refusal to Obey Instructions - Work Overtime 7:3634.

CIRCUMSTANCES: The grievor was dismissed from her job after she informed her employer that she would not be able to work any evening overtime due to the difficulty she had finding a babysitter for her young son. Under the terms of the collective agreement all employees may be required to work overtime in certain situations.

The union argues that the grievor was dismissed without just cause and that it is improper for an employer to discipline an employee for prospective misconduct. Circumstances can change with time and, unless an infraction has actually incurred it cannot be assumed that the employee will actually break the contract. In addition, the employer did not follow the procedures outlined in the agreement for infractions of the rules. The discipline it chose was excessively harsh.

The employer maintains that the employee's blanket refusal to work evening overtime was justification for the action taken. The statement refusing to work overtime was in itself a breach of obligations. Allowing the employee to continue would undermine its authority to require other employees to work overtime. It argues that there are precedents for discipline in anticipatory breaches of conduct.

AWARD: The grievance succeeds. The agreement allows the employer to discipline based on 'just cause'. As there is no definition of this phrase provided, common sense and common law must determine the meaning. The intended breach of conduct could have been dealt with by the employer when it actually occurred. The employer should not discipline an employee in the absence of actual misconduct.

The arbitrator also finds that the penalty was excessive in relation to the offence. A written warning would have been more appropriate.

AUTHORITIES: Bowater Mersey Paper Company Limited v. The Canadian Paperworkers Union, Local 141 (1976), 22 N.S.R. (2d) 198 (Hart J.); Re Canada Glazed Papers Limited and Printing Specialties and Paper Products Union, Local 466 (1974), 5 L.A.C. (2d) 355 (Beatty); Re Corporation of the City of Nanaimo and Canadian Union of Public Employees, Local 401 (1981), 30 L.A.C. (2d) 304 (Larson); Re Humpty Dumpty Foods Limited and Retail, Wholesale, Bakery and Confectionery Workers' Union, Local 461 (1981), 3 L.A.C. (3d) 112 (Hinnegan); Trade Union Act, S.N.S.

1972, c.19, s.41(d).

DECISION: 86-76

Rossignol Construction and Forms Ltd. AND Labourers' International Union of North America, Local 615

William H. Kydd, Arbitrator

Ronald Pink, for the union
July 16, 1986

ISSUES: Union Security - Check-off 9:1200; Pension Plans-Benefits 4:1400.

CIRCUMSTANCES: The union is grieving the fact that although members had their dues deducted from their salaries each month for seven months, these amounts were never remitted to the union. In addition an amended agreement was signed between the union and the Construction Association Management Labour Bureau Ltd. regarding wages. Notice was sent to the employer. The employer paid the increase but did not remit funds for Health and Welfare, Pension, and Industry Improvement.

The employer had no representation at the hearing.

AWARD: The arbitrator finds in favour of the union and the employer is ordered to remit the funds owed to the union.

DECISION: 86-77

Metropolitan Transit Commission AND Amalgamated Transit Union, Local 508

Innis Christie, Chairman; Donald H. McDougall; David Reynolds

Arthur S. Beaver, for the union
Terry Roane, for the employer
July 11, 1986

ISSUE: Interpretation - Intention of the Parties 4:2100; Insurance and Welfare Plans - Entitlement to Benefits 8:3320.

CIRCUMSTANCES: The grievance arose when the employer posted a notice which stated that sick pay will be withheld from all employees who do not provide a medical certificate when one has been requested. The union filed a grievance on the day the notice was posted alleging violation of the collective agreement. The union does not deny the employer's right to request a medical certificate but it denies the right of the employer to withhold

sick pay, claiming the agreement does not specifically allow the employer to do this. The agreement specifically states the situation under which sick pay can be withheld, i.e. to those employees who report illness after their scheduled time to report to work. The agreement also gives the employer the recourse to fire employees who abuse sick leave. Had it been intended that sick pay was to be withheld, the union claims that the agreement would have clearly stated so.

The employer states that entitlement to sick leave arises under certain conditions and when these are not met, sick leave can legitimately be withheld.

AWARD: The grievance is denied. The agreement specifically states the condition under which sick leave with pay shall be granted and when the condition is not satisfied, i.e. a medical certificate is not provided, the entitlement to sick pay does not arise. The Articles in the agreement are clear and a plain reading of them favours the position of the employer.

DECISION: 86-78

The Metropolitan Transit Commission AND Amalgamated Transit Union, Local 508

T. A. Crowell, Chairman; D. P. Reynolds; D. H. MacDougall

A. Beaver, for the union
T. Roane, for the employer
June 17, 1986

ISSUES: Disciplinary and Discharge - Grounds for - Refusal to Obey Instructions, Health and Safety 7:3621; Just Cause 7:1200; Procedural Limitations on Discipline 7:1400.

CIRCUMSTANCES: The grievor, a bus driver for the Commission, complained that he could not drive a particular bus safely due to the height of the seat and the position of its mirrors. The first time he complained of the situation he was reassigned to another bus. The second time the employer would not reassign the grievor. After the bus was inspected and deemed safe the grievor was suspended for the rest of his shift because he refused to drive the bus. The grievor claims his suspension was unjust and that he was denied union representation at the time management suspended him pending an investigation. The union representative was present at that meeting, which followed shortly, and which resulted in the suspension.

The employer argues that the grievor's concerns were considered and that the bus was fully tested after his complaints were made. After it was deemed safe and the grievor continued to refuse to

drive the bus, the employer was fully constituted to take disciplinary action.

AWARD: The grievance fails. The issue is whether the grievor had reasonable grounds to believe that driving the bus would be unsafe. The Board finds that the grievor had no solid grounds for refusing to drive the bus. The bus was examined after the grievor's complaints and nothing was found to be wrong with the visibility. The Commission had just cause for imposing discipline. Based on the fact that the "suspension for investigation" had no immediate impact on the grievor and that the discipline was awarded only after consultation with the union representative, the Board finds that the article in the agreement regarding the employee's right to union representation in certain situations does not apply in this case.

DISSENT (Reynolds): The grievor's refusal to drive the bus for safety reasons were genuine. The employer had recognized his concern on one occasion and therefore, granted legitimacy to the grievor's complaints. The refusal to perform the work was reasonable and the disciplinary action was improper.

With regards to the matter of union representation, the grievor lost pay from the moment the suspension for investigation purposes took place. Thus, the discipline commenced before union representation was available to the grievor. The discipline should therefore, be void.

AUTHORITIES: Steel Co. of Canada Ltd. (1973), 4 L.A.C. (2d) 315; Brown and Beatty, Canadian Labour Arbitration (2d), p.443; Re Steel Col of Canada Ltd. and United Steelworkers, Local 1105 (1975), 8 L.A.C. (2d) 375; Re Canex Placer Ltd. and CAIMA, Local 17 (1978), 21 L.A.C. (2d) 127; Re Milnes Fueland and Teamsters Union (1981), 29 L.A.C. (2d) 427; Re Calgary Public Library and C.U.P.E. and U.S.W., Local 1005 (1973), 4 L.A.C. (2d) 68; Occupational Health and Safety Act, S.N.S. 1985, c.3.

DECISION: 86-79

Civil Service Commission AND Nova Scotia Government Employees Union

Bruce Outhouse, Chairman; David Reynolds; Gregory North

Ronald Pink, for the union
William Wilson, for the employer
July 21, 1986

ISSUES: Job Classifications and Descriptions - Creation or Revision 5:2200, 5:2440; Collective Agreement Limitations 5:2200.

CIRCUMSTANCES: The employer began a unilateral review of all classifications in 1983. The union was worried about the effect this would have on its members and a Memorandum of Agreement was signed re appeal procedures available to employees once the new system was in place.

A meeting took place between union and employer and it was agreed that only those bargaining units which did not have existing classifications listed in the agreement would be affected. Another memorandum was signed delaying the implementation of the system. In addition it introduced an obligation for both parties to consult each other re classification appeals. Unfortunately, relations deteriorated and the union charged that it was not being kept informed by the employer.

The union has finally submitted a policy grievance. It refers to the Memorandums and the collective agreements of each unit which state that the employer is to provide information regarding employees to the union.

The employer responds with the argument that the agreements refer to information needed for the collective bargaining process and that this is not such a case. The employer is not required to bargain the classification of positions. In addition, they plan to keep the union informed, one bargaining unit at a time. This conciliatory response helped matters and at the time of the hearing there were only four outstanding requests for information left to rule on.

The employer claims that the union already has all the information it needs in order to bargain on behalf of its members.

AWARD: The Board finds that the employer is violating the collective agreement and the Memorandum of Agreement by withholding some of the requested information. The union already has enough information on the other matters to allow it to bargain effectively.

The Board does not uphold the union's request for damages because the grievance makes no such claims for relief and it is difficult to identify causal connection between the employer's breaches and any employee's financial loss.

The Board also commented on the obvious differences between the two parties' definitions of 'classification'. The Board is not empowered to settle the question but favorable mention is made of the union's view that position titles are considered classifications and that this extends to those units which do not have classifications defined in their agreements.

AUTHORITIES: N.S.G.E.U. on behalf of Sherry McPherson, Irving

Deal and Martha Brown and Civil Service Commission (January 15, 1986) (unreported) (Outhouse); Civil Service Collective Bargaining Act, S.N.S. 1978, c.3, s.28, 29.

DECISION: 86-80

Civil Service Commission AND Nova Scotia Government Employees Union

S. Bruce Outhouse, Arbitrator

Ronald A. Pink, for the union
William M. Wilson, for the employer
July 22, 1986

ISSUES: Skill and Ability - Arbitral Review - Senior Employee if Relatively Equal 6:3220; Burden of Proof 3:2413, 6:3200; Management Rights 5:0000; Remedies - Authority to Award 2:1400.

CIRCUMSTANCES: The union claims that the employer violated the collective agreement when it appointed a junior applicant to a vacant position in preference to the grievor.

Both sides agree that the process followed by the employer in judging the applicants was a fair one. All were rated against a predesigned interview rating form and each member of the selection board rated the applicants independently. As a result of these interviews, two applicants emerged with virtually the same top score. The employer next took a look at the top six applicants, maintaining that the interview was only one step in the complete hiring process. The field was again narrowed to two. Both applicants had excellent references from previous employers. The employer decided to bypass the grievor based on the fact that the successful applicant's previous experience seemed to have given him a 'decided edge' over the grievor. The union argues that based on the interview results, it is clear that the grievor and the successful applicant were judged to be of equal merit. The grievor is obviously qualified for the position and he has more seniority. The employer has no basis to claim that the previous work experience of the successful applicant was more applicable than that of the grievor's.

The union requests that the position be awarded to the grievor rather than calling for a reposting since the position has been filled for over a year and the grievor would be at a decided disadvantage in a fresh competition.

The employer maintains that the union has failed to prove that the two candidates were of equal merit, and that under the agreement the burden of proof lies with the union. Too much significance has been attached to the interviews which were

merely designed to weed out the candidates for final selection.

If, however, the grievance is allowed, the employer argues that the arbitrator does not have the authority to award the position to the grievor. Such an award would usurp management's rights and would only be acceptable in a case where the employer had acted in bad faith.

AWARD: The grievance succeeds in part. In the opinion of the arbitrator the union had proven that the two final candidates were of equal merit. The work experience of the two had been previously examined and they were deemed to be relatively equal. The employer stepped beyond the bounds of reason when it decided that the successful applicant had more relevant work experience.

The remedy ordered is that the position be reposted. It would be highly unusual for an arbitrator to award a position to another candidate. The extraordinary step of substitution has only been taken previously in cases of obvious bad faith on the part of the employer. Restrictions are placed on the competition to minimize the disadvantage to the grievor, since the position has been filled for the past year.

AUTHORITIES: Re N.S.G.E.U. on behalf of Jean Ferguson and Civil Service Commission (1985), S.H. No. 51672 (Kelly); Re Bank of Montreal, Tweed Branch and Commercial Workers Union, Local 486 (1982), 6 L.A.C. (3d) 289 (Carter); Re N.S.G.E.U. on behalf of Peter Sutherland and Civil Service Commission (March 19, 1981), unreported (Outhouse); Re N.S.G.E.U. on behalf of Howard Donahue and Civil Service Commission (May 27, 1981), unreported (Outhouse); Re N.S.G.E.U. on behalf of Judith Clayton and Civil Service Commission (August 31, 1981), unreported (Langille); Re N.S.G.E.U. on behalf of Bruce Pettipas and Civil Service Commission (July 20, 1984), unreported (Outhouse); Re N.S.G.E.U. on behalf of Janet Vermeulen and Civil Service Commission (May 8, 1984), unreported (Darby); Re N.S.G.E.U. on behalf of Jean Ferguson and Civil Service Commission (March 8, 1985), unreported (Darby).

DECISION: 86-81

The Metropolitan Transit Commission of Halifax, Dartmouth and the Municipality of the County of Halifax AND Amalgamated Transit Union, Local 508

W. Brent Cotter, Chairman; Donald H. McDougall; David Reynolds
July 28, 1986

ISSUES: Interpretation 4:2100; Arbitrability - Agreement as Primary Source of Jurisdiction 2:1200; Job Classifications and Descriptions - Creation or Revision 5:2000; Working Hours and

Shifts 5:3100.

CIRCUMSTANCES: This is a policy grievance re the posting of two positions by the employer. The first complaint alleges that the employer violated the collective agreement when it failed to identify the Department Heads on the job postings. The Board finds this is a clear violation of the agreement and was an obvious oversight by the employer. Since the union sought no particular remedy the matter was dropped.

The second issue involves the lunch break entitlements of the recipients of the two job postings in question. The union claims that because both positions involve regular work of one day of the weekend then they should be classed 'shift work mechanic' positions and, consequently, the workers are entitled to a paid lunch break. The agreement does not define a shift worker but is does clearly define those who are not shift workers. Other provisions of the agreement support this interpretation. The employer claims that the agreement provides for three groupings of employees: Monday to Friday workers, shift men, and those who work day time hours but who are not shift workers and, therefore, are not entitled to the paid lunch break. Past practice of the employer is consistent with its present position. The union must prove that its interpretation was the appropriate one.

AWARD: The decision is in favour of the employer. The phrase 'maintenance shift man' in the agreement is ambiguous. The clause the union relies upon to define non-shift workers merely defines a group of workers entitled to work security. The arbitrator finds that this clause does not define all non-shift workers since it excludes any employees hired for daytime work after September 27, 1984.

References to the two classes of workers are intended to emphasize the difference between the two groups. Working one day of the weekend does deviate from the norm of regular day workers but not to the extent that these two positions could be considered to be shift positions.

The employees are not entitled to a paid lunch break.

DISSENT (Reynolds): The majority's decision is an unreasonable one and it has added provisions beyond those contained in the agreement. The premise upon which the Board's decision is founded, that shift men cannot regularly work days, contradicts the language of the agreement. Overtime provisions recognize two types of employees. The employer has created a third group of employees that is not substantiated in the agreement. The majority erred in awarding in the employer's favour.

AUTHORITIES: Re U.S.W., Local 6304 and Electric Reduction Co. of Canada Ltd. (1972), 24 L.A.C. 248 (Gorsky).

DECISION: 86-82

The Grace Maternity Hospital **AND** The Canadian Brotherhood of Railway, Transport and General Workers Union

Gregory North, Chairman; J. A. MacLellan, A. R. Cunningham

Boyd Lee, for the union
David A. McKillop, for the employer
August 6, 1986

ISSUES: Warning 7:4210; Disciplinary Penalties - Nature of Disciplinary Sanction 7:4210.

CIRCUMSTANCES: The grievor received a letter from the employer which explained the reasons for the poor job evaluation that had recently been given out. The letter stated that further action will be taken unless the grievor's performance improves.

A grievance was filed based on the argument that this written letter of reprimand had not been a past practice. The claim is made that this letter is being used to justify the employer's actions with regards to another grievance which is pending.

The employer claims that the matter is not arbitrable since the letter was of an non-disciplinary nature. In any case, the employer maintains that issuing such a letter comes under the management rights clause of the agreement. The agreement does not allow the employer to introduce letters of which the grievor is not aware but, since this clause does not apply to non-disciplinary letters it is not in effect here.

The grievor argues that it was a disciplinary letter since it constitutes a warning. In such a case the employer must show just cause for its actions.

AWARD: The grievance is dismissed. An employee cannot be disciplined for a negative performance evaluation. The employer has said that the letter would not be used in any future disciplinary action and consequently, the conclusion is that the matter is not disciplinary in nature and therefore is not arbitrable. The Board reinforces the employer's intention by ordering that the letter not be used in any further grievance proceedings.

DECISION: 86-83

The Cove Guest Home **AND** Canadian Brotherhood of Railway, Transport and General Workers, Local 620.

Frank L. Elman, Arbitrator

Tom Barron, for the union
Warren MacDonald, for the employer
August 5, 1986

ISSUES: Work Assignment - Bargaining Unit Work 5:1200; Res Judicata - Decisions of Other Board of Arbitration 1:3000, 2:3220; Management Rights - Work Assignment 5:2000.

CIRCUMSTANCES: The employer gave permission to one of the C.N.A.'s to have an unexpected day off. It was felt that the other scheduled C.N.A. would be able to cover the additional work. Unfortunately, this second employee called in sick on the day in question. As a result R.N.s had to perform the duties of the absent C.N.A.s.

The union claims that there was a qualified C.N.A. available for work and the employer violated the agreement when it failed to call her in. The employer admits that the C.N.A. was not contacted since she would have to be paid double time for her work.

AWARD: The grievance succeeds. It is clear that the C.N.A.'s work was performed by non-bargaining unit employees on the day in question. The arbitrator finds that the doctrine of res judicata applies here since a previous case has dealt with the same situation. The decision of that arbitrator appears logical and without a flaw. The employer's management rights are acknowledged but, in this case, they are inconsistent with the terms of the agreement in that the employer did not exhaust all possible avenues of bargaining-unit employees. The employer is directed to pay the overlooked employee what she would have been paid had she worked the shift.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration (2d) p.16; C.A.M.L. B.L.V. I.B.E.W., Local 625 et al., (1983) 59 N.S.R. (2d) 345 (S.C.T.D.).

DECISION: 86-84

Eastern Elevator Services Ltd. AND International Union of Elevator Constructors, Local 125

R. Lorne MacDougall, Arbitrator

Ronald A. Pink, for the union
Eric B. Durnford, for the employer
August 13, 1986

ISSUE: Arbitrability - Subject - Matter Limitations 2:1200; Jurisdiction - Concurrent Jurisdiction - Administrative Agencies 1:1400.

CIRCUMSTANCES: The grievors, employees of Eastern Elevator Co. claim that they were laid off contrary to the provisions of the collective agreement. They argued that they had seniority over an employee of E. E.Elevator Maintenance and that, since the two companies are, in effect, the same corporate employer, they had the right to bump that employee.
Eastern maintains that the two companies are separate and distinct and that employees cannot cross over from one company to the other. The union agrees that if the companies are found to be separate and distinct then the employer is correct in its stance and the issue should proceed no further. If, however, they are found to be the same employer then the issue must be heard on its merits.

Many facts were put forth outlining the relationship of the two companies over the past five years. The union argues that the arbitrator has the power to treat the provisions of any statute as part of the collective agreement. The Trade Union Act, according to the union, gives the arbitrator the authority to deem that the two companies are one. In addition the union maintains that the arbitrator can declare any agreement which is binding on the original company to have the same effect on the successor company. This would mean that E. E. would be bound by the agreement of Eastern with the Construction Management Labour Bureau.

AWARD: It is found that the arbitrator does not have the jurisdiction to decide on the preliminary issues and that the grievance is not arbitrable before him on the supposition that the two companies are really one corporate entity.

The section of the Trade Union Act to which the union refers as giving power to an arbitrator to declare these two companies as "one" specifically uses the term 'Board". The arbitrator finds that this refers to the Labour Relations Board and the power given by the statute refers to that entity alone.

The same response applies to the union's argument that the arbitrator has the authority to order successor companies to comply with the agreements signed by the originating company. The Labour Relations Board is the body that has the power to answer these questions and applications must be made to it.

AUTHORITIES: Trade Union Act, S.N.S. c.19, s.29, 103(6), 41(e), 20.

DECISION: 86-85

R. K. Macdonald Nursing Home Corporation **AND** Canadian Brotherhood of Railway, Transport and General Workers, Local 605

J. A. MacLellan, Arbitrator

E. A. Powell, for the union
A. G. MacDonald, for the employer
August 22, 1986

ISSUES: Time Limits - Relief Against Non-Compliance 2:3140; Disciplinary Penalties - Mitigating Factors 7:4400; Discipline and Discharge - Grounds for - Theft 7:3310, 7:3312, 7:3314.

CIRCUMSTANCES: The grievor was suspended after she was charged with theft from a fellow employee. The union claims that this suspension is contrary to the collective agreement.
The employer raised the preliminary objection that the grievance cannot proceed to arbitration since the procedures set forth in the agreement were not followed. The grievor acknowledged this non-compliance but claims that past practice, and her understanding of the steps to follow in this instance made strict compliance unnecessary.

The preliminary objection is set aside since the arbitrator finds that the grievor was unintentionally misled concerning the time limits stipulated in the relevant sections of the collective agreement.

Both sides agree on the facts of the case. Thefts had been occurring at the nursing home for some time. The grievor was seen by a video camera taking money from a purse. Her defence was that she was testing the area to prove that the nurses were being watched. After an investigation the grievor was convicted of theft of $1.00. The grievor has been suspended since her first trial in 1984.

AWARD: The grievance is upheld. While he recognizes the severity of theft of any kind, the arbitrator rules that the circumstances of this case are such that he is confident the grievor will never again be involved in a theft of any king. She has been through a lengthy suspension and two court trials and surely has learned a valuable lesson. The employer is ordered to reinstate the employee. No back pay is avarded and seniority rights are lost.

DECISION: 86-86*

Yorkdale Drywall Ltd **AND** United Brotherhood of Carpenters and Joiners of America, Local 83 and S. Bruce Outhouse, Arbitrator, and The Honourable Brian Young, The Minister of Labour

Mr. Justice C. Denne Burchell, Trial Division, Supreme Court of Nova Scotia

R. A. Pink, for the respondent
B. G. Johnston, for the applicant
July 18, 1986

ISSUE: Statutes - Applied by Boards of Arbitration 1:5400.

CIRCUMSTANCES: In a previous grievance the arbitrator found that the company had subcontracted work in a manner contrary to the collective agreement. This is an application for orders in the nature of certiorari to set aside the award ordered by the arbitrator at that time.

The arbitrator found that the 'so-called' subcontractors were in reality employees of the company. In addition, he found that time limitations in the agreement put on awards were superceded and displaced by the Trade Union Act.

The applicant claims that the arbitrator could not conclude the employees were subcontractors under the collective agreement and that he erred in not limiting the award in accordance with the provisions of the agreement.

The section of the Trade Union Act in dispute refers to its substitution for procedures in collective agreements in the construction industry with respect to arbitration of arbitration procedures. The appellant argues that this does not apply to certain aspects of the grievance procedure such as time limits. The respondent claims that the Act acts as a complete package which includes the grievance procedures when it refers to the arbitration process.

The applicant maintains that if the legislature meant to include grievance procedures then these would have been specified. In addition, it is argued that the sections of the agreement in question are not in conflict with the provisions of the statute and, consequently, they must be followed.

AWARD: The submissions of the applicant are accepted. The Trade Union Act does not have the authority to be substituted for the grievance procedures outlined in the collective agreement. Moreover, the procedures in question which limit the amount of time available for the application of the arbitration process are consistent with the spirit of the statute. The collective agreement appears to have been drafted with the intention of supplementing the provisions of the statute. The award of the arbitrator is quashed with respect to the time limits allowed by the arbitrator in applying the Act rather than the stricter limits set by the collective agreement. The balance of the award

stands.

AUTHORITIES: Re Wean-MacKay of Canada Limited (1971) 23 L.A.C. 27; O'Kelly v. Trusthouse Forte Place (1983) 3 All E.R. 456; Brown and Beatty, Canadian Labour Arbitration, 2nd ed. 1984, p.79; Trade Union Act, S.N.S. 1972, c.19, s.103.

* This is an appeal of arbitration summarized as 85-67.

DECISION: 86-87

City of Dartmouth AND Nova Scotia Union of Public Employees, Unit #1

Peter Darby, Chairman; John D'Orsay; Eric Durnford

Ronald Stockton, for the union
Michael Moreash, for the employer
August 11, 1986

ISSUE: Discipline and Discharge - Grounds for - Alcoholic Beverages 7:3560; Disciplinary Penalties - Mitigating Factors-Employment Record 7:4428; Rehabilitative Potential 7:4422; Remedies - Substitution of Lesser Penalty 2:1470.

CIRCUMSTANCES: The grievor is contesting his dismissal by the employer for whom he had worked for the past 25 years, as unjust and in violation of the collective agreement.

The grievor had been involved in an incident with a company truck in which he broke a number of company rules such as the use of alcohol during work hours, using a company vehicle for purposes other than work-related and lying to the employer regarding the circumstances of the incident. He was suspended without pay pending completion of an investigation. After his conviction under the Criminal Code he was dismissed from his position.

The grievor claims that the discipline is too severe and that a lesser penalty should be substituted. The union argues that the grievor was an alcoholic and that he did not realize that he needed professional help until the night of the incident.

The employer argues that the grievor is not an alcoholic and that his attendance in professional help programs since the filing of the grievance are part of a ploy to excuse the conduct of the night in question.

AWARD: The grievance succeeds. The employer's decision to dismiss the grievor is set aside and a lesser penalty is substituted. It is acknowledged that the employer had just cause to discipline the grievor but the argument of the union that the grievor was an alcoholic is considered relevant in this matter.

employee is not found to have irretrievably damaged the employment relationship. Since the grievor's alcoholism is the root of the problem its correction must be the focus of the discipline. In addition, the fact that the grievor has shown initiative in enrolling in a rehabilitation program, substitution of a lesser penalty is warranted.

The Board orders that the grievor should be reinstated to a lesser position where he can be fully supervised by the employer. This is conditional on the grievor's remaining in the AA program for at least two years. The grievor must also compensate the employer for the loss of the company vehicle. Termination of employment can occur after this period of two years, if the grievor is again guilty of misconduct related to alcohol abuse.

AUTHORITIES: Wm. Scott and Company Ltd. and Canadian Food and Allied Workers Union, Local P-162 (1977), 1 C.L.R.B.R.; Brown and Beatty, Canadian Labour Arbitration (2nd ed, 1984) p.483; Steel Equipment Co. Ltd. (1964), 14 L.A.C. 356; Re Jones and the Queen in Right of the Province of New Brunswick (1981), 27 L.A.C. (2d) 184; Re Canadian Pacific Ltd. and Brotherhood of Railway Signalmen (1981), 27 L.A.C. (2d) 87.

DECISION: 86-88

Dalhousie University AND Dalhousie University Faculty Association

Kenneth P. Swan, Arbitrator

G.J. McConnell, for the union
Eric Durnford, for the employer
August 6, 1986

Issue: Management Rights 1:2000, 4:2300; Interpretation-Intention of the Parties 4:2100; Evidence - Types of Evidence-Extrinsic Evidence - Negotiating History 3:4420; Evidence-Agreed Facts 3:2610; Remedies - Type of Grievance - Promotion 6:4100.

Circumstances: The parties submitted joint evidence on the background of the case, but disagreed on whether or not the procedure for appointment of a departmental chairperson had been correctly followed. The union contended that the employer's actions in the matter violated the intent of the collective agreement about faculty participation in such decision making. The employer justified its action by arguing that the department in question had lost confidence in the procedure outlined in the agreement. In the event a procedural breach has occurred the employer argues that a declaration is the appropriate remedy; the union seeks an order declaring the appointment which the employer made to be null and void.

Award: The grievance succeeds as the employer's action was deemed contrary to the intent of the collective agreement. The arbitrator limited the remedy to a declaration that the employer had unilaterally altered the procedure contrary to the provisions of the collective agreement. He declined, however, to make any order declaring the appointment which had been made as a result of the employer's improper actions to be null and void, as he felt this would be "a sterile exercise... which would simply cause further chaos and disruption for virtually no purpose." The Faculty Council of the Faculty of Arts and Science has since revised the disputed procedure.

Authorities: Re Bridgeland Riverside Community Association and the City of Calgary et. al. (1982), 135. D.L. R. (3d) 724.

DECISION: 86-89

Glace Bay Credit Union AND Union of Bank Employees, Local 2107

Charles O'Connell, Arbitrator

Everett Baker, for the union
Harold MacKinnon, for the employer

Issue: Vacation 8:3210; Interpretation - Dictionaries 4:2210, Intention of the Parties 4:2100.

Circumstances: The union grieved the employer's decision not to grant an employee the correct amount of annual vacation time. At issue was the union's understanding of the definition of the anniversary of the commencement of employment insofar as this affects vacation time.

Award: The grievance fails. The arbitrator clarified the intent of the collective agreement concerning vacation time, and also clarified the definition of anniversary date as it affects calculation of allowable vacation time.

Authorities: Black's Law Dictionary, 5th ed.; Barnhart's College Dictionary.

DECISION: 86-90

Municipal Contracting Ltd. AND International Union of Operating Engineers, Local 721

R. Lorne MacDougall, Arbitrator

Edgar C. Doull, for the union
Terry Roane, for the employer
August 27, 1986

Issue: Jurisdiction - Concurrent Jurisdiction - Administrative Agencies 1:4000, 1:4100; Interpretation 4:2000, 4:2100; Procedure - Adjournments 3:2300; Job Classifications and Descriptions - Bargaining Unit Work Defined By 5:1200; Bargaining Unit - Definition 5:1100; Management Rights 5:0000.

Circumstances: The union alleges that the employer has violated the intent of the collective agreement and has failed to comply with the terms of the agreement. At issue is the classification of certain jobs and whether or not they fall under the terms of the collective agreement. The employer counters that the arbitrator has no jurisdiction in the matter since it had already made formal application to the Construction Industry Panel to resolve several issues connected to the present grievance. Both parties have agreed to waive time limits for the arbitrator to make a decision.

Award: The arbitration is adjourned. The arbitrator claims that he has jurisdiction concurrent with the Panel. He will remain seized of the issue unless the Panel fails to reach a decision concerning the work sector designation for the disputed jobs.

Authorities: Trade Union Act (Nova Scotia) S.103 (4); S. 103 (7). Re Pepsi-Cola Canada Ltd and United Brewery Workers, (1972) 1 L.A.C. (2d) 391-393.

DECISION: 86-91

Moosehead Breweries Ltd. AND Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local 361.

Bruce Outhouse, Arbitrator

John MacPherson, for the union
Brian Johnston, for the employer
August 27, 1986

Issue: Contracting Out 5:1300; Management Rights 5:0000; Work Assignment - Bargaining Unit Work 5:1200; Lay-Off - Assignment of Work 6:2354; Remedies - Type of Grievance - Contracting Out 2:1424.

Circumstances: The union claimed that the employer had improperly contracted out the work associated with sorting of bottles, and that as a result of contracting out some lay-offs of unionized workers had occurred. The employer contended that it had the right to contract out this work and the work contracted out does

not fall under the jurisdiction of the collective agreement. They also argued that any lay-off that resulted was due only to surplus of inventory, and not to the improper assignment of work to non-unionized employees.

Award: The grievance succeeded in part. The arbitrator found that the employer had improperly contracted out work that, according to the agreement, properly fell under the terms of the agreement. He found also that there was no connection between the lay-offs and contracting out, and therefore awarded no damages.

Authorities: Re United Steel Workers of America and Russelsteel Limited (1966), 17 L.A.C. 253 (Arthurs); Re Air Canada and Canadian Airlines Association (1975), 10 L.A.C. (2d) 113 (O'Shea); Re Country Place Nursing Home Limited and Canadian Union of Public Employee, Local 1854 (1981), 1 L.A.C. (3d) 341 (Prichard); Re Northern and Central Gas Corporation Limited and United Steel Workers (1972), 1 L.A.C. (2d) 147 (Rayner); Kennedy Lodge Nursing Home and Service Employees' Union, Local 204 (1980),28 L.A.C. (2d) 388 (Brunner).

DECISION: 86-92

Brookfield Foods Limited AND Retail, Wholesale & Department Store Union, Local 1015

S. Bruce Outhouse, Arbitrator

Roseanne M. Stoke, for the union
James C. Leefe, for the employer
August 29, 1986

Issue: Bargaining Unit - Contracting Out Of 5:1300; Estoppel 2:2200, 2:2210; Interpretation - Management Rights 4:2300; Management Rights - Revision of Job Content 5:2200; Job Classifications and Descriptions - Creation or Revision 5:2000; Grievance Procedure - Failure to Reply 2:3128.

Circumstances: There are two grievances. The union contends that the employer eliminated a bargaining unit position and created one in its place that was out of the bargaining unit. Second, it contends that the employer violated the collective agreement concerning grievances by failing to respond to its grievance in writing. To the first issue the employer claimed that it had not acted improperly, and reserved management rights to make changes affecting the status of such positions. To the second it countered that it had not violated provisions of the agreement requiring written response to a grievance: first, because it claimed that the union's grievance was not valid on the grounds of its right to make changes in the workplace; second, because it argued that it had kept the union informed.

Award: Both grievances succeed. The decision recognized the employer's right to make changes in the organization of its workforce, but only subject to limitations outlined in the collective agreement. In this case the employer was prohibited by the agreement from contracting in or contracting out employees. The doctrine of estoppel was found not applicable in this case. The arbitrator also ruled that replies to grievances must be given in writing and include stated reasons. Authorities: Re Consolidated-Bathurst Packaging Limited and International Woodworkers of America, Local 2-242 (1982), 6 L.A.C (3d) 30 (MacDowell); Re Hallmark Containers Limited and Canadian Paperworkers Union, Local 303 (1983), 8 L.A.C. (3d) 117 (Burkett).

DECISION: 86-93

Maritime Telegraph & Telephone Company, Limited AND Atlantic Communications & Technical Workers Union, Plant Workers

J.A. Maclellan, Arbitrator

Ronald Pink, for the union
Gregory I. North, for the company
September 3, 1986

ISSUES: Collective Agreement: Form and Content - Amendments 4:1300; Interpretation of Collective Agreement 4:2000; Wages-Mode of Payment 8:1400.

CIRCUMSTANCES: The Union took issue with the Company's manner of implementing voluntary direct payroll deposit of wages, which consisted of having individual employees sign a form to permit this new method of payment. The Union claimed that this new method of payment conflicts with the Collective Agreement which provides for the time and method of payment, payment to be by cheque; also that the voluntary form signed constitutes a revocable contract with individual union members and if the company wished to make this kind of arrangement they should first have sought permission from the union, the sole collective bargaining agent on behalf of employees covered by the Collective Agreement.

The Union seeks a declaration that the company violated the Collective Agreement.

The Company argues it did not enter into individual agreements and, further, did not violate the Collective Agreement, as the Collective Agreement article in question pertains to time and not to mode of payment.

AWARD: The grievance succeeds. The company was found to have violated the Collective Agreement which expresses the mode as well as the time of payment and should have obtained the consent of the union before undertaking to change the intent of the Collective Agreement. This is found to be a technical breach since the union does not object to the direct payroll system.

DECISION: 86-94

Eastern Drywall Acoustics Limited AND United Brotherhood of Carpenters and Joiners of America, Local 83

William H. Kydd, Arbitrator

Mr. Gordon Forsyth , for the union
(No one appeared for the employer)
September 10, 1986

ISSUE: Settlements 2:3230.

CIRCUMSTANCES: A grievance re violation of the collective agreements by the employer was settled by agreement between the union and the employer; an agreement was tendered; terms are as set out in the arbitration decision.

AWARD: As agreed between the parties, it was ordered that the employer pay to the union the sum of $3,040.00.

DECISION: 86-95

Steen Contractors Limited AND Sheet Metal Workers International Association, Local 56

Charles O'Connell, Arbitrator

Mr. Bernard Boudreau, Q.C. , for the union
Mr. Hugh A.R. Simpson, for the employer
September 16, 1986

ISSUE: Interpretation - Intention of the Parties 4:2100, Aids to Interpretation 4:2200, - Prior Agreements 4:2240; Remedies-Authority to Award 2:1400.

CIRCUMSTANCES: A preliminary objection was raised by the employer challenging the jurisdiction of the arbitrator on the grounds that the Union had no bargaining rights against the company. The objection was dismissed because the company, as an accredited member of the Construction Association Management Labour Bureau, is bound by the provisions of the current

collective agreement between the Bureau and the Union local in question. Authorities cited by the employer were found to have no application in this case.

The Union grieved that the company violated the Collective Agreement by not paying per day board to three employees from Sydney hired at Port Hawkesbury, and seeks that they should be paid from date hired to the present and as long as they remain employed by the employer.

The employer argued that because the employees were hired in Port Hawkesbury, they did not come under the entitlement article of the collective agreement. Further, the employer claims that because such a grievance must be filed within seven working days prior to the filing of the grievance.

At issue was interpretation of the word "hired" in the Collective Agreement. This word was examined in context of the Collective Agreement and the article of the Collective Agreement at issue was compared with its predecessor in preceding collective agreements in determining the intention of the parties in changing the wording.

Re limiting any award to seven days prior to grievance, the arbitrator stated that the article dealing with time limits has nothing to do with defining the parameters of an award. The date of filing is rather to determine jurisdiction of the arbitrator and the subsequent process.

AWARD: The grievance succeeds. The three employees shall be paid the set allowance per day for each day worked from date of hiring and each and every day they remain employed by the employer at the job site in Port Hawkesbury. The right to set amounts, upon application, is reserved in the event the parties cannot agree.

AUTHORITIES: Brett, M.R.; Re Construction Association Management Labour Bureau Limited and International Brotherhood of Electrical Workers, Local 625 (MacDougall); R.G. Masonry Limited and International Union of Bricklayers & Allied Craftsmen (Clarke); Re Yorkdale Drywall Ltd. and United Brotherhood of Carpenters & Joiners of America, Local 83 and S. Bruce Outhouse (Burchell).

DECISION: 86-96

Kenmount Ford Sales Limited AND Canadian Brotherhood of Railway, Transport & General Workers, Local 506

J. Bernard Boudreau, Q.C., Arbitrator

T.A. Barron, for the union
G.S. Khattar, Q.C., for the employer
September 11, 1986

ISSUE: Remedies: Damages 2:1410, Type of Grievance - Union Security - Damages 2:1426; Work Assignment: Employees Outside Unit 5:1400; Contracting Out - Remedies 5:1500.

CIRCUMSTANCES An employee laid off from his position as a No. 3 Partsman grieved that management personnel were working the stockroom at least in part, in violation of the Collective Agreement, and requested all money owed him while management was working the stock-room during his layoff, plus interest.

Clear evidence showed the company's volumes were down and several employees had been laid off; that there was work for one bargaining unit worker, but the work available was work for which the grievor was not qualified; and there was no requirement within the Collective Agreement to provide the grievor with the necessary training to perform the work available, that of a No. 1 Partsman.

AWARD: The grievance succeeds in part. Management has violated the Collective Agreement by employing management personnel to perform bargaining unit work. The compensation requested by the grievor is denied because he did not have the skills necessary to perform the bargaining unit work available.

Because the original grievance was signed not only by the grievor but also by the local chairman of the Union local, and as the Union has suffered damages as a result of the violation of Collective Agreement and it is within the jurisdiction of the arbitrator to compensate the Union for such damages, the Board awarded as damages to the Union an amount of money equal to the Union dues which would have been paid by a No. 1 Partsman, from the date of the grievor's layoff to the date of the Board's decision.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration, p. 61; Re Ontario Hydro and Canadian Union of Operating Engineers, Local 110, 12 L.A.C. (2d), p. 147.

DECISION: 86-97

Maritime Paper Products Limited AND Canadian Paperworkers' Union, Local 1520

Bruce Outhouse, Arbitrator

Dennis Grant, for the union
Karin McCaskill, for the employer

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September 18, 1986

ISSUE: Discipline and Discharge: Grounds for - Refusal to obey instructions 7:3610; Disciplinary Penalties: Arbitral Review-Scope 7:4100; Obey now, grieve later 7:3610; Reasonable personal excuse 7:3626.

CIRCUMSTANCES: The material facts of this case are not in dispute. After repeatedly refusing to comply with her supervisor's order to wear her safety earmuffs properly, with the band above the head instead of under the chin, and after being warned that she would be sent home, the grievor was sent home six hours before the end of her shift. The next day she was allowed to return to work on condition she wear her earmuffs properly. As discipline for her conduct she was to be treated as having been suspended for the six hours not worked.

The employer stated it was justified in suspending the employee by virtue of the grievor's refusal to follow a direct order, which constituted insubordination, and that the suspension was a reasonable disciplinary response. According to the "work now, grieve later rule", the grievor, if she wished to challenge her supervisor's instructions, was to file a grievance.

The Union alleged the employer breached the Collective Agreement by suspending the grievor without reasonable cause; that she was free to disregard the instructions given her since they dealt exclusively with her personal safety and, as proved by subsequent events were unreasonable since the manufacturer's instructions showed that the band of the safety earmuffs could properly be worn under the chin provided the cups which fitted over the ear were adjusted to suit the band selection; and that because the instructions were unreasonable since they do not come under the "work now, grieve later" rule. Even if this rule does apply, the Union submitted that the grievor was at worst guilty of "symbolic insubordination" which warranted nothing more than an oral or written warning, and the employer should have issued her a warning letter in accordance with the system of progressive discipline set out in the Collective Agreement rather than suspending her; and if cause for discipline is found, that the penalty be reduced from suspension to a warning letter.

AWARD The grievance fails and is dismissed. The "work now, grieve later" rule applies. The reasonableness or unreasonableness of the order is not the issue; the grievor could have complied with the order without compromising her own legitimate interests and more than adequate redress was available through the grievance procedure. Suspending the grievor for the balance of her shift was a reasonable disciplinary response for insubordination and was not precluded by the Collective Agreement. Due to the ongoing nature of the offence, the Collective Agreement does not restrict the employer to issuing

the grievor a warning letter.

AUTHORITIES; Re York Farms Ltd., Sardis and Canadian Food and Allied Workers, Local P430 (1981), 2 L.A.C. (3d) 112 (Christie); Re United Automobile Workers, Local 636 and Holland Hitch of Canada Ltd. (1972), 23 L.A.C. 378 (Brandt); Re Motor Wheel Corp. of Canada Ltd. and United Automobile Workers, Local 127 (1974), 7 L.A.C. (2d) 262 (Hinnegan); Brown and Beatty, Canadian Labour Arbitration (2nd ed.), pp. 434-439; Re Thameswood Lodge and London and District Service Workers Union, Local 220 (1984), 15 L.A.C. (3d) 228 (Verity); Re Air Canada and Canadian Airline Flight Attendants' Assoc. (1975), 9 L.A.C. (2d) 254 (Deverell); Re FBM Distillery Co. Ltd. and United Brewery Workers, Local 304 (1978), 20 L.A.C. (2d) 161 (Arthurs).

DECISION: 86-98

Maritime Beverages Limited **AND** Teamsters, Chauffeurs, Warehousemen, Helpers, and Miscellaneous Workers, Local 927

J.A. MacLellan, Chairman; Sandra Whitehead, John Plowman

Bill Lemmon, for the Union
Wylie Spicer, for the Employer
September 29, 1986

Issue: Collective Agreement - Matters Arising Outside of 2:1200; Disciplinary Penalties 7:4000, Discriminatory 7:4414, Employment Record 7:4428; Discipline and Discharge - Grounds For - Criminal Convictions 7:3422, Off-Duty Conduct 7:3010; Evidence - Extrinsic Evidence 3:4400; Remedies - Reinstatement 2:1470.

Circumstances: A grievance has been filed by an employee who lost his driver's license as a result of a conviction under the Criminal Code for refusing the breathalyzer. Because his job requires a license, he petitioned the employer to be reinstated as a helper, a position not requiring a driver's license, until he regains his license and so can again be a driver. The employer denied the petition. The grievor alleged that he was discriminated against since other employees who had lost licenses but did not so inform the employer, were granted transfers to the position of helper. The employer denied the employee's petition in order to avoid setting a precedent in such cases. No company policy exists covering such matters.

Award: The grievance succeeds in part. The grievor is to be reinstated to his former position, with no loss of seniority, within one week of presenting proof to the employer that he has a valid driver's license. There is nothing in the collective agreement or company policy that requires the employer to provide another job until the reinstatement occurs. No discrimination has

taken place because the employer did not know about the circumstances in the other transfer cases, and because no company policy covers this situation, the grievor has not received discriminatory treatment.

DECISION: 86-99

L.J. Casavechia Contracting Limited AND International Union of Operating Engineers, Local 721

William H. Kydd, Arbitrator

Gordon Forsyth, for the Union
Terry Roane, for the Employer
September 30, 1986

Issue: Arbitrability - Concurrent Jurisdiction 1:4000; Collective Agreement - Binding Effect - Determination Of 4:0000, Term of Operation 4:1620; Decisions of Other Boards of Arbitration-Applications - Aid to interpretation 4:2220, Precedential Value 3:5000; Evidence - Relevance 3:4200, Opinion Evidence 3:4600; Remedies - Type of Remedy - Compliance Order 2:1450; Union-Check Off 9:1200; Adjournments 3:2300.

Circumstances: The union grieved the employer's refusal to provide the union with dues and benefits contributions deducted from employees at two work sites. Before the arbitrator hears evidence bearing on the case, the employer raised questions about his jurisdiction since it had applied to the Construction Industry Panel to revoke or vary the certification of the union. If the arbitrator is found to have jurisdiction, the employer asked that whatever funds are awarded be held in trust until the Panel's decision on certification is reached. The employer also asked for dismissal of the union's case since they need to prove the number of employees involved, time periods worked, etc.

Award: The arbitration proceeds since at the time of the case, the union is recognized as the certified bargaining agent for the employees, and therefore the arbitrator has jurisdiction. The grievance succeeds and the full amount requested for one site, and a partial amount for the second site, must be paid to the union. Partial payment is ordered for the second site due to the speculative nature of the circumstances there. The stay of execution is not granted to the employer because the employer failed to prove that denial of a stay would be prejudicial.

Authorities: Trade Union Act, Section 93 (2); Municipal Contracting Limited and International Union of Operating Engineers, Local 721, August 27, 1986, Lorne MacDougall, Unreported (Summarized as 86-90); York Dale Drywall Limited v. Carpenters and Joiners et al, S.H.No.55190; United Brotherhood of

Carpenters and Joiners and MacDougall Construction Limited; Notice of Appeal to the Appeal Division of the Supreme Court of Nova Scotia, Rule 62.10(1), (2); Blue Nose Lanes Limited v. Richart (1975), 12 NSR (2d) 540.

DECISION: 86-100

Governors of Dalhousie College and University AND Canadian Union of Public Employees, Local Union Number 1392

William H. Kydd, Arbitrator

Raymond Hill, for the Union
Eric Durnford, for the Employer
September 30, 1986

Issue: Leave of Absence 7:3120; Interpretation - Intention of the Parties 4:2100, Management Rights 4:2300, Good Faith 4:2300, Fairness 2:1200; Decisions of Other Boards of Arbitration-Applications - Aid to Interpretation 4:2220; Evidence - Burden of Proof - Applications - Illness - Qualifying for Benefits 8:3320; Evidence - Types of Evidence - Extrinsic Evidence 3:4400, Past Practice 3:4430; Benefits - Alteration of Gratuitous Benefits 8:1400; Illness or Disability - Benefits 8:3300.

Circumstances: The grievor applied for more than one day of sick leave to care for an ill child. The employer denied sick leave for more than a single day, requiring instead that the additional time be taken as vacation days. The employer maintains that it has the right to decide on each sick leave application on its own merits. The union argued that the employer did not act in a fair and reasonable manner.

Award: The grievance fails. The collective agreement states that the employer has the right to review applications for sick leave. The procedures used by the employer were found to be fair and not applied in a rigid manner.

Authorities: Calgary and Rural General Hospital District Number 83 and United Nurses of Alberta, Local 121, (1984) 15 L.A.C.(3d) 2903; Re Corporation of the City of Windsor and Ontario Nurses Association (1985) 19 L.A.C. (3d) 1; Meadow Park Nursing Home and Service of Employees International Union, Local 220 (1983) 9 L.A.C. (3d); Re Great Atlantic and Pacific Company of Canada Limited and Bakery, Confectionary and Tobacco Workers International Union, Local 264 (1984), 18 L.A.C. (3d) (Ontario); Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association et al (1981), 124 D.L.R. (3d) 684; Council of Printing Industries of Canada and Toronto Printing Pressmen and Assistants Union No. 10 et al (1983), 149 D.L.R.(3d) 53; Toronto East General Hospital and Service

Employees Union (1984) 13 L.A.C. (3d) 400; Brown and Beatty. Canadian Labour Arbitration (2nd. edition), p.361; Hawker Siddley Canada Trenton Works Division v. United Steel Workers of America Local 1231 (1983) 59 N.S.R. (2d) 29; Province of Ontario and Ontario Provincial Police Association (1977) 16 L.A.C. (2d) 307.

DECISION: 86-101

Metropolitan Transit Commission AND Amalgamated Transit Union, Local 508

J.A. MacLellan, Chairman; David Reynolds, Donald H. MacDougall

John McPherson, for the Union
Terry Roane, for the Employer
September 8, 1986
October 1, 1986 (dissent)

Issue: Decision of Other Boards of Arbitration - Applications-Aid to Interpretation 4:2220; Discrimination - Transfer 6:3000; Interpretation - Management Rights 4:2300, Transfer 6:2100, Vacancy 5:2510; Job Classifications and Descriptions - Creation or Revision 5:2000, 5:2200, Transfer of Work Between 5:2000; Job Posting - Posting Procedure 5:2520; Remedies - Type of Grievance - Failure to Consult 5:3100, Type of Remedy - Declaration 2:1450.

Circumstances: The union claimed that the employer violated the collective agreement with respect to the transfer of jobs within a particular job classification. The grievor requested a declaration from the Board that the employer must follow proper procedure as stated in the agreement, consult with the union, and consider the grievor's application for transfer to a position within his own department. The employer stated that it did not consult the union because the position in question was not a job transfer, but a reassignment of duties within the same classification. The employer argued that the union's position does not state the intent of the collective agreement.

Award: The grievance succeeds. A transfer was found to have taken place in this case since the jobs in question are separate and distinct. A transfer is not restricted to moves between classifications. The employer is directed to consult with the union and to give consideration to the grievor as outlined in a section of the collective agreement.

Dissent: Donald H. MacDougall. He supports dismissal of the grievance on the grounds that no transfer of employees actually took place. The award is said only to require the employer "to consult with the union on this matter", thus not clearly implying that the grievor would be in a new position. He takes exception to this definition of transfer since it may not easily apply to

other moves within a single job classification. He feels the majority opinion is too limited. The lack of job description also hinders proper application of the collective agreement, and impinges on management rights.

Authorities: Brown and Beatty. Canadian Labour Arbitration, (2nd edition) p.274; The Canada Breadco Ltd.; Niagara Television; International Nickle; Ottawa General Hospital; Tunq-Sol.

DECISION: 86-102

The University of the College of Cape Breton AND The U.C.C.B.Faculty Association of University Teachers

N.M.Scaravelli, Arbitrator

John D'Orsay, for the Union
Bernard Boudreau, for the Employer
September 30, 1986

Issue: Picket Lines - Refusal to Cross 7:3640; Discipline and Discharge - Absence of Just Cause Provision 7:1200, Common Law 7:1100, Scope of Arbitral Review 7:4100; Management Rights 5:0000, Power to Discipline 7:1000; Arbitrability - Subject Matter Limitations 2:1100; Interpretation 4:2000, 4:2100, Aids to Interpretation - Past Practice 2:2220; Remedies - Types of Remedy - Authority to Award 2:1400.

Circumstances: The grievors refused to cross a picket line set up by another union at the site of employment. The employer notified the grievors that they would be suspended for one day for each day absent from work and would be disciplined by forfeiting pay for the days missed. The bargaining agent for the grievors is the Canadian Association of University Teachers which has a Voluntary Recognition Agreement with the employer but no formal, collective agreement. The union questioned the employer's right to discipline the grievors, and the appropriateness of the penalty. It also argued that the right to discipline and impose penalties must come from the collective agreement, statute or common law, and asserted that the employer was not empowered to enact discipline. The employer claimed that the union had acknowledged a collective agreement by submitting to collective bargaining and to arbitration procedures under provisions of the Trade Union Act. The grievors requested compensation for the day they were suspended, but not for the days they did not work.

Award: The grievance succeeds. The employer is ordered to compensate the grievors for lost pay for the days of their suspension. The finding disagrees with the employer's contention that by accepting arbitration, the union agrees to the employer's right to discipline. The employer has no power to discipline

where the agreement is "completely silent as to discharge or discipline." The arbitrator also asserted that had the employer had the right to discipline, discipline in this case would have been reasonable.

Authorities: Trade Union Act; Re Peterborough Lock Manufacturing Company Limited and U.E.W. Local 527 (1954) 4 L.A.C. 1499, p.1502; Re Board of Education for the City of Hamilton and Ontario Public School Teachers Federation (1984) 13 L.A.C. (3d) 27; Re Board of Education for the City of London and Ontario Secondary School Teachers Federation, District Four (1984) 14 L.A.C. (3d) 17; Swan Valley Division Association No.35 of Manitoba Teachers Society v. Swan Valley School District Division No.35 (1984) 31 Man. R. (2d) 118; Palmer. Collective Agreement Arbitration in Canada (2d) p.233; Re A.C. Horne Company Limited (1954) 4 L.A.C. 1524, p.1526.

DECISION: 86-103

Civil Service Commission AND Nova Scotia Government Employees Union

T.A. Cromwell, Arbitrator

Ronald A. Pink, for the Union
William Wilson, for the Employer
August 28, 1986

Issue: Interpretation - Intention of the Parties 4:2100, Words and Phrases - Layoff 6:2200, Transfer 6:2100; Layoff - Notice 2:1425, 4:2100, 6:2320.

Circumstances: The grievors were given written notice that the program in which they were working was to be moved to a new location. They were given the opportunity to continue employment at the new location, which they chose to do. The union argued, however, that under the terms of the collective agreement, the grievors should have received forty days notice of the employer's intent to relocate the program to a new site. Moreover, it argued that the grievors were laid off at the first site and then rehired at the new one. The grievors asked for pay in lieu of proper notice. For its part, the employer argued that a clear distinction exists between layoff and transfer. Layoff implies severance of employment; in this situation only a relocation or transfer to a new site of employment took place. The grievors experienced no interruption in pay and therefore are not entitled to compensation.

Award: The grievance fails. Relevant provisions in the collective agreement provide for means to prevent "de facto layoffs from occurring under the guise of transfers." The intention of the

parties in the agreement reflects an ordinary meaning of the words layoff and transfer (or relocation). The right to notice does not apply in cases of transfer.

Authorities: Re The Crown in Right of Ontario and the Ontario Public Service Employees Union (O.H.I.P. Grievance) (1982), 3 L.A.C. (3d) 385.

DECISION: 86-104

Civil Service Commission AND Nova Scotia Government Employees Union

S. Bruce Outhouse, Arbitrator

Kimberley H.W. Turner, for the Union
Alison W. Scott, for the Employer
September 9, 1986

Issue: Overtime - Overtime Hours Worked 8:2130, Management Rights 5:3210, Right to Claim 4:2100; Wages - Overtime Pay 8:2100.

Circumstances: The union alleges that the employer has violated the collective agreement by denying overtime to the grievor who was attending a training course. The employer contends that the grievor was not entitled to overtime because when employees are on special (voluntary) leave to attend training courses, they are not entitled to overtime and therefore no violation of the collective agreement has occured. Additionally, the grievor's attendance at this course had nothing to do with her 'normal' duties, and therefore cannot be considered work. In turn, the union argued that overtime is defined as authorized work in excess of work regularly scheduled. Authorized attendance at a training course for which study and preparation time are necessary thus constitutes overtime work. The union requested four days of overtime for work that was done on 'rest days.'

Award: The grievance fails. Because the training was taken on voluntarily and was unrelated to the grievor's regular work, no overtime was accumulated.

Authorities: Re Steinberg, Inc. and United Food and Commercial Workers Union,Local 486 (1985), 20 L.A.C. (3d) 289 (Foisy); Re Dominion Stores Ltd. and Retail, Wholesale and Department Store Union, Local 1065 (1978), 20 L.A.C. (2d) 118 (Teed); Re Hamilton Street Railway Co. and Amalgamated Transit Union, Local 107 (1981), 1 L.A.C. (3d) 355 (Shime); Re London and District Association for the Mentally Retarded and Ontario Public Service Employees Union (1984), 16 L.A.C. (3d) 165 (Saltman); Re N.S.G.E.U. on Behalf of Kevin Penney and Civil Service Commission (February 10, 1982), unreported (Christie); Brown and Beatty.

Canadian Arbitration (1977); Palmer. Collective Agreement Arbitration in Canada (1978), p.497.

DECISION:: 86-105

The Dominion Chair (1985), Limited AND Canadian Paperworkers Union, Local 126

Bruce Outhouse, Arbitrator

Dennis Grant, for the Union
John Ballard, for the Employer
October 8, 1986

Issue: Statutory Holidays 8:3100; Bargaining Unit - Employees Excluded 5:1120, 5:1122, Temporary, Casual or Part-Time 5:1124; Collective Agreement - Oral Agreements - Estoppel 2:2210; Interpretation - Aids to Interpretation 4:2200, Words and Phrases - Employees 5:1122, Temporary 5:1124; Statutory Holidays - Active Employment Relationship 8:3120;
Union - Compliance with Collective Agreement - Check Off 9:1200; Negotiating History 3:4420; Temporary, Casual and Part-Time Employees 5:1124.

Circumstances: The union grieved the employer's failure to give holiday pay to two employees. The employer acknowledged its failure to do so, but claimed that the employees were not members of the bargaining unit, and therefore did not fall under holiday provisions of the collective agreement. The union replied that the two employees were relief workers at the time of the grievance, and therefore did qualify for the holiday pay. The employer claimed that based on recent contract negotiations, the union should be estopped from claiming holiday benefits for these employees.

Award: The grievance fails. The collective agreement does not apply to casual or part-time employees before they become eligible for union membership. The decision is based on interpretation of the terms 'eligible' and 'employee', as found in the collective agreement. The estoppel argument is not dealt with because it was resolved by the eligibility issue.

Authorities: Re Sault Ste. Marie Board of Education and Canadian Union of Public Employees, Local 216 (1974), 5 L.A.C. (2d) 179 (Shime); Re City of Kelowna and Canadian Union of Public Employees, Local 338 (1980), 25 L.A.C. (2d) 314 (Larson).

DECISION:: 86-106

Scottsburn Co-operative Services Ltd. AND Retail, Wholesale Dairy Workers, Local 198

David J. MacDonald, Chairman, Frank Elman, Everett Baker

Reeves Matheson, for the Union
James C. Leefe, for the Employer
October 3, 1986

Issue: Discipline and Discharge - Off-Duty Conduct 7:3010, Criminal Conduct 7:3422, 7:3424, Prior Record 7:4310, Theft 7:3310, 7:3314; Disciplinary Penalties - Employment Record 7:4428; Remedies - Authority to Award - Substitution of Penalty 2:1470.

Circumstances: The grievor was twice convicted of criminal offenses committed during non-work hours. The employer terminated the grievor's employment following the second offense, claiming its right to discipline employees in such situations, and fearing that public knowledge of the grievor's convictions would damage the company's reputation and trust with its clients.

Award: The employer's right to discipline is upheld. However, on the basis of his past work record, the grievor's termination is denied, and instead a lesser penalty is substituted: a six month suspension without pay. After this period the grievor is to be reinstated, but in a position that entails little or no contact with customers.

Authorities: Brown and Beatty. Canadian Labour Arbitration (1984) 2nd edition, pp. 349, 350, 399; Re Huron Steel Products Co. Ltd. and U.A.W. Local 195 (1964) 15 L.A.C. 288, at page 289.

DECISION: 86-107

Ronald Levangie Insulators AND United Brotherhood of Carpenters and Joiners of America, Local 83

Douglas G. Ruck, Arbitrator

Ronald Pink, for the Union
Ronald Levangie, for the Employer
October 16, 1986

Issue: Union - Security - Check Off 9:1200.

Circumstances: The employer admits to having failed to remit to the union the dues and benefits payments deducted from employees' wages. The union requests that the total amount due be paid even though the employer is having financial problems and is in debt to Revenue Canada.

Award: The grievance succeeds. The employer is ordered to pay the total amount due to the union.

DECISION: 86-108

Technical University of Nova Scotia AND Nova Scotia Government Employees Union

R. Lorne MacDougall, Chairman, Michael Tynes, Donald H. McDougall

John P. Merrick, for the Union
Eric B. Durnford, for the Employer
September 17, 1986

Issue: Evidence- Types of Evidence - Extrinsic Evidence 3:4400, Past Practice 3:4430; Collective Agreement - Ambiguity 3:4400, 3:4410; Interpretation - Aids to Interpretation 4:2200, Past Practice 2:2220, Intention of the Parties 4:2100; Good Faith-Merit Increases 8:2310; Management Rights 4:2300.

Circumstances: Two grievors claim the employer has treated them in an unfair and discriminatory manner by denying them merit pay increments. The union argues that the employer has a duty to act reasonably, fairly and in good faith, as implied in the collective agreement. It also states that the term 'meritorious performance' in the agreement is ambiguous, leaving the employer in a position to interpret the term as it sees fit. The employer argues that management rights are the fundamental issue in the case, with no arbitral authority imposing a general duty on the employer to act reasonably and in good faith, unless there is specific direction for this in the collective agreement. The employer claims that evidence regarding a standard for this issue is inadmissable. Both parties agree that there are no time constraints for filing this award.

Award: A preliminary award is made. The employer has the discretion to grant or deny merit increments, based on the wording of the collective agreement. Its decision must be reached in good faith, and good faith is accepted as necessary in the process of merit case review, though reasonable and fair are not necessary criteria. Extrinsic evidence to clarify the meaning of meritorious performance is not admissable; however, past practice evidence is admissable on the issue of good faith. Evidence from this preliminary award will not carry any weight in the final determination of the issue involving the two grievors.

Authorities: Gorsky. Evidence and Procedure in Canadian Labour Arbitration p. 207; Toronto East General Hospital and Service Employees' Union, Local 204, (1984) 13 L.A.C. (3d) 400 (K.M. Burkett et. al.); Re Meadow Park Nursing Home and S.E.I.U. (1983)

9 L.A.C. (3d) 137 (K.P.Swan, at page 141); Re St. Joseph's Hospital, Chatham and Ontario Nurses' Assn., (1985) 19 L.A.C. (3d) 280 (R.J. Roberts).

DECISION: 86-109

National Sea Products Ltd. AND Canadian Seafood and Allied Workers' Union, Local 101

Claude H. Foisy, Chairman, Dennis Grant, Eric Durnford

Kimberley H.W. Turner, for the Union
Donald H. McDougall, for the Employer
October 15, 1986

Issue: Management Rights 5:0000, Work Assignment 5:1000, Arbitrariness and Discrimination 5:3220; Call - In Pay - Layoffs 6:2200; Good Faith - Overtime Distribution 5:3220, Assignment of Work 5:4100, Schedules 5:3100; Overtime - Distribution of Overtime 5:3220, Person Normally Performing 5:3222; Working Hours and Shifts 5:3100; Layoff - For Less Than One Shift 6:2220.

Circumstances: The union claims that the employer violated the collective agreement by not scheduling or calling-in the grievor to work on a Saturday evening shift. It claimed that this failure constitutes a lay-off and also amounts to a breach of the employee's seniority. The employer contends that the collective agreement was not violated, no lay-off occurred, and that an unforeseen mechanical break-down in the plant was the cause of the need for a worker in the employee's classification. This situation could not have been anticipated.

Award: The grievance fails. The collective agreement does not require the employer to call in employees who normally perform the work required. In the special circumstances of this case, the employer's response was a reasonable one.

Dissent: (Grant)

Authorities: Re City of Edmonton (1984) 15 L.A.C. (3d) 137 (Taylor); Ballycliffe Lodge (1984) 14 L.A.C. (3d) 37 (Adams); United Steelworkers and Algoma Steel Corporation (1968), 19 L.A.C. 236 (Weiler); Brown and Beatty. Canadian Labour Arbitration 2nd ed.; Re Thompson Products Ltd. (1970) 22 L.A.C. 45 (Brown); Ford Motor Company of Canada Ltd. (1962) 13 L.A.C. 8 (Cross).

DECISION: 86-110

The Nova Scotia Power Corporation AND International Brotherhood of Electrical Workers, Local 1928

W. Brent Cotter, Arbitrator

Mr. MacPherson, for the Union
Terry Roane, for the Employer
October 8, 1986

Issue: Discipline and Discharge - Theft 7:3310, 7:3314; Disciplinary Penalties 7:4000, Mitigating Factors 7:4400, Rehabilitative Potential 7:4422, Employment Record 7:4428; Remedies - Authority to Award 2:1400, Substitution of Penalty 2:1470, 7:4000, 7:4100; Decision of Other Boards of Arbitration-Applications - Aid to Interpretation 4:2220; Good Faith-Discriminatory Discipline 7:4414.

Circumstances: The grievor is discharged for theft from the employer. The employer maintains that discharging the employee is consistent with its response to similar cases, and that an effective deterrent is necessary to prevent cases of employee theft or fraud. The union argues that the employee's actions were affected by mitigating circumstances - alcoholism. The employer argues that the arbitrator's jurisdiction is limited to a determination of whether the discharge was made in good faith, or was arbitrary and without reason. The union argues that the arbitrator's jurisdiction includes review of the penalty imposed, and that he may substitute any other penalty found just and reasonable.

Award: The grievance succeeds. The arbitrator finds that he has jurisdiction to substitute a lesser penalty. Discharge is found to be unwarranted in this case as mitigating factors are relevant. The employer's policy is found to be inflexible and inappropriate. The grievor is to be reinstated without compensation and without loss of seniority. He must also meet strict conditions regarding alcoholism rehabilitation.

Authorities: Re Outboard Marine Corp of Canada Ltd. and United Steelworkers, Local 5009 (1974), 4 L.A.C. (2d) 82 (Reville); Trade Union Act, S.N.S. 1972, c.19; Re Nova Scotia Power Corporation and International Brotherhood of Electrical Workers, Local 1928 (1976 Nova Scotia unreported); Re Hawker Siddley of Canada Ltd. and Industrial Union of Marine and Shipbuilding Workers, Local 1 (unreported); Re Toronto East General Hospital Inc. and Service Employees International Union (1975), 9 L.A.C. (2d) 311 (Beatty); Re Canadian Broadcasting Corporation and Canadian Union of Public Employees (1979) 23 L.A.C. (2d) 227

(Arthurs); Re Polymer Corporation Ltd. and Oil, Chemical and Atomic Workers, Local 9-14 (1973), 4 L.A.C. (2d) 148 (Palmer); Re Spruce Falls Power and Paper Co. Ltd. and Lumber and Sawmill Workers, Local 2995 (1971), 22 L.A.C. 406 (Johnston); Re National Grocers Co. Ltd. and Teamsters Union, Local 419 (1985) 11 L.A.C. (3d) 193 (Langille); Re Ford Motor Company of Canada and United Auto Workers,Local 2000 (1970), 22 L.A.C. 35 (Weatherill); Re Nova Scotia Liquor Commission and Nova Scotia Liquor Commission Employees Union, Local 470 C.L.C. (1974), 5 L.A.C. (2d) 117 (Richard); Re Nova Scotia Power Corporation and International Brotherhood of Electrical Workers, Local 1928 (Richard) (1976, Nova Scotia, unreported); Air Canada and International Association of Machinists and Aerospace Workers (1982), 2 L.A.C. (2d) 442 (Shine); Re British Columbia Telephone Co. and Telecommunications Workers Union (1978), 18 L.A.C. 225 (J. Weiler); Re Eastern Provincial Airways (1963) Ltd. and Canadian Air Line Employees' Association (1980) 24 L.A.C. (2d) 31 (Barry); Brown and Beatty, Canadian Labour Arbitration (2nd ed.), at p. 391; Re McManus and Treasury Board (Revenue Canada, Customs and Excise) (1980), 25 L.A.C. (2d) 150 (Adams); Northwood Pulp and Timber Ltd. and Canadian Paperworkers Union, Local 603 (1974), 7 L.A.C. (2d) 244 (Wilson); Re Air Canada and International Association of Machinists and Aerospace Workers, District Lodge 148 (1978), 18 L.A.C. (2d) 400 (Swan); Re Dupont (Canada) Ltd. and Kingston Independent Workers Union (1984), 10 L.A.C. (3d) 424 (Swan); Re Air Canada and International Association of Machinists and Aerospace Workers, District Lodge 148 (1983), 8 L.A.C. (3d) 401 (Palmer); Re Dominion Stores Ltd. and Retail Wholesale and Department Store Union, Local 414 (1982), 6 L.A.C. (3d) 193 (Kates); Re Cook and the Crown in Right of Ontario (ministry of Labour) (1979), 22 L.A.C. (2d) 1 (Swinton); Re B.C. Plumbing Supplies Ltd. and Teamsters Union, Local 213 (1984), 14 L.A.C. (3d) 121 (Black).

DECISION: 86-111

Glasgow Metals Limited AND Millwright and Machine Erectors Local Union 1178

N.M. Scaravelli, Arbitrator

John Wood, for the Union
Laurence MacDougall, for the Employer
October 29, 1986

Issue: Union - Recognition 9:1100, Grievance - Damages for Violation of Union Security 9:1200, Compliance with Collective Agreement - Damages 2:1426, 5:1500; Remedies - Types of Remedy-Damages - 2:1410.

Circumstances: The union grieved a violation of the collective

agreement respecting union security. The employer hired two millwrights to be contracted out without first contacting the union's business manager to hire workers on the union list, or to obtain permission to hire local members. The workers who were hired were, in fact, union members. However, the employer did not recognize the union before contracting for these workers. The employer also denied the union representative access to the work site. The union claimed damages for these violations. The employer claimed it made efforts to contact the union, but also claimed that the union said permission was not necessary since the employer had always received permission in the past in similar hiring situations.

Award: The grievance succeeds in part. The employer was found to have violated union security by failing to make any contact with the union, as well as refusing access to the project site. However, the collective agreement does not authorize a monetary penalty for breach of its provisions. Since the workers employed were union members, there was not loss of dues or work. The award to the union is for the employer to pay the union business agent's travel expenses only.

Authorities: Brown and Beatty. Canadian Labour Arbitration. Second edition, p. 61; Re: Kellogg-Salada Canada Inc. v. American Federation of Grain Millers, Local 154, p.25; Re: Great Lakes Paper, 15 L.A.C. p.97.

DECISION: 86-112

Civil Service Commission AND Nova Scotia Government Employees Union

S. Bruce Outhouse, Arbitrator

Kimberley Turner, for the Union
William M.Wilson, for the Employer
October 24, 1986

Issue: Job Posting 6:2310, Fair and Reasonable 5:2520, Criteria 6:3300; Skill and Ability - Requirements of Job 6:3100, Senior Employee if Relatively Equal 6:3220; Management Rights 1:2000; Estoppel - Change of Grounds 3:2200.

Circumstances: The union and employer each contend that the other's candidate for a position should not have been considered since neither candidate filed an application on time. The employer argues that the real issue is whether or not the competition was conducted in a fair and reasonable manner. The union contends the employer did not carry out a fair selection process because it failed to assess the competency of the applicants, and the quality of their work. The employer denied

any breach of the collective agreement, and asserted its belief that the arbitrator cannot assess the qualifications of the candidates but can only determine if the selection process was fair and reasonable.

Award: The grievance succeeds. Both applicants were properly included in the competition since the collective agreement does not require that a job competition be closed after a certain date. The employer is estopped from challenging the grievor's status as a candidate. The employer was found to have assessed the applicants in an unreasonable manner. The employer is to post the position again, and the incumbent is not to be credited for the experience gained in the past year.

Authorities: Re Rothmans of Pall Mall Canada Ltd. and Tobacco Workers' International Union, Local 319 (1974) 6 L.A.C. (2d) 235 (Shime); Re Marks and the Crown in Right of Ontario (Ministry of Natural Resources) (1981), 30 L.A.C. (2d) 64 (Weatherill); Re: N.S.G.E.U. on behalf of Vincent Pottie and Civil Service Commission (July 15, 1985), unreported (Darby); Re: Mintus and Doran (1982), 52 N.S.R. (2d) 674 (Clarke, J.); N.S.G.E.A. on behalf of Howard Donahoe and C.S.C. (May 27, 1981), unreported (Outhouse); Re: N.S.G.E.U. on behalf of Delia MacChesney, Margaret Brown and Ann Shea and C.S.C. (April 12, 1984), unreported (Kelly); Re: Board of School Trustees of School District No. 68 (Nanaimo) and Canadian Union of Public Employees, Local 606 (1985), 19 L.A.C. (3d) 176 (Germaine); Re N.S.G.E.U. on behalf of David Peters and C.S.C. (July 22, 1986), unreported (Outhouse); Re University of British Columbia and Canadian Union of Public Employees, Local 116 (1982), 5 L.A.C. (3d) 69 (Munroe).

DECISION: 86-113

Northside Community Guest Home Society AND Canadian Union of Public Employees, Local 1876

Robert F. Ferguson, Arbitrator

Kevin MacNeil, for the Union
David Ryan, for the Employer
October 23, 1986

Issue: Vacation 8:3210, Computation of Vacation and Vacation Pay 8:3220; Interpretation - Aids to Interpretation - Past Practice 2:2220, Intention of the Parties 4:2100, Words and Phrases-Length of Service - Continuously Employed 8:3220; Management Rights - Vacation Scheduling 8:3240; Evidence - Types of Evidence - Extrinsic Evidence - Past Practice 3:4430.

Circumstances: A grievance was filed by a group of employees, disputing the amount of vacation time an employee is entitled to

under the collective agreement. The union argues that vacation time is earned on the anniversary date of employment, as outlined in the collective agreement. The employer maintains that past practice relied on a cut off date to determine the amount of eligible time. The collective agreement does not specify such as cut off date, but the practice has been convenient for the employer in scheduling vacation time.

Award: The grievance succeeds. Employees who have completed ten years of service are entitled to twenty working days of vacation to be taken in the twelve month period following the completion of ten years of service (i.e. the anniversary date). If employees received more vacation time in the past than entitled to, then it should be deducted from their present entitlement.

Authorities: Re Lancia-Bravo Foods and Butcher Workmen, 14 L.A.C. (2d) p. 348-9.

DECISION: 86-114

Civil Service Commission AND Nova Scotia Government Employees Union

S. Bruce Outhouse, Arbitrator

Ronald A. Pink, for the Union
William M. Wilson, for the Employer
October 30, 1986

Issue: Wages - Overtime Pay 8:2100, Estoppel - Delay in Complaining or Grieving 2:3210; Overtime 5:3200, Management Rights 5:3210, Right to Claim 4:2100; Remedies - Type of Grievance - Overtime 2:1422, 5:3240, Types of Remedy - Damages-Certainty of 2:1410, Authority to Award 2:1400; Time Limits-Relief Against Non-Compliance 2:3140.

Circumstances: The grievor claims compensation for all overtime work since becoming a civil servant. She had not been compensated in either lieu time or money as covered by the collective agreement. The employer argues that the grievor's employment position is excluded from the overtime provisions of the collective agreement. The employer also raised four, preliminary jurisdictional objections.

Award: The grievance succeeds. The arbitrator has jurisdiction in the matter, and overruled all the employer's jurisdictional objections. The employer never met with the union to exclude the grievor's position from overtime provisions in the collective agreement. The employer misled the employee about her entitlement to overtime compensation. If the parties do not reach agreement, the arbitrator retains jurisdiction to award an amount for

accumulated overtime.

Authorities: Re The Crown in Right in Nova Scotia and Nova Scotia Government Employees Union on behalf of Edward Milligan and Paul Therrio (1985), 21 L.A.C. (3d) 35 (Darby); Re Civil Service Commission of Nova Scotia v Nova Scotia Government Employees Union, Edward Milligan and Paul Therrio (1986), 73 N.S.R. (2d) 51 (Nathanson, J.) ; Re Arnprior and District Memorial Hospital and Ontario Nurses' Association (1982), 4 L.A.C. (3d) 444 (Weatherill); Re Dominion Stores Limited (Sarnia) and United Steelworkers (1983), 9 L.A.C. (3d) 238 (Roberts); Re District of Coquitlam and Canadian Union of Public Employess, Local 386 (1982), 4 L.A.C. (3d) 295 (Greyell); Re Clarke Institute of Psychiatry and Ontario Nurses' Association (1982), 5 L.A.C. (3d) 155 (Beck); Re C.S.C. and N.S.G.E.A. on behalf of Arthur Bennett (January 22, 1982), unreported (Christie); aff'md Re Bennett (1982), 52 N.S.R. (2d) 517 (Grant, J.); Re United Steelworkers', Local 7105 and Automatic Screw Machine Products Limited, (1972), 23 L.A.C. 296 (Johnston); Re United Automobile Workers and National Auto Radiator Manufacturing Company (1967) 18 L.A.C. 326 (Palmer); Re United Electrical,Radio and Machine Workers of America, and Canadian General Electric Company, (1952), 3 L.A.C. 980 (Laskin); Re Union Gas Company of Canada Limited and International Chemical Workers, Local 741 (1972), 2 L.A.C. (2d) 45 (Weatherill); Re Goodyear Canada Inc. and United Rubber Workers, Local 232 (1980), 28 L.A.C. (2d) 196 (Picher); Re United Steelworkers and International Nickel Company of Canada Limited (1970), 22 L.A.C. 286 (Weatherill); Brown and Beatty. Canadian Labour Arbitration 2nd.ed. pp.95-96; Re Hawker Siddeley Canada Inc., Trenton Works Division and U.S.W., Local 1237 (1983), 59 N.S.R.(2d) 29 (Nathanson, J.); Ontario Labour Relations Act, Section 44.

DECISION: 86-115

Alpine Excavators Limited AND International Union of Operating Engineers, Local 721

R. Lorne MacDougall, Arbitrator

Edgar C. Doull, for the Union
R.J. Ross Stinson, for the Employer
November 18, 1986

Issue: Contracting Out 5:1300, 5:0000.

Circumstances: The union alleges that the employer violated the collective agreement by contracting out work that resulted in the layoff of union members. The employer denies any violation of the agreement at any of the work sites involved, claiming job completion at one site, and being fired at the other.

Award: The grievance fails. The union has failed to provide evidence that any contracting out of work had occurred.

DECISION: 86-116

Dalhousie University AND Dalhousie Faculty Association

Kenneth P. Swan, Arbitrator

Gerald J. McConnell, for the Union
Wylie Spicer, for the Employer
November 21, 1986

Issue: Collective Agreement - Ambiguity 3:4400; Decisions of Other Boards of Arbitration - Applications - Aid to Interpretation 4:2220; Fairness - Context of Collective Bargaining 4:2300; Good Faith - Skill and Ability 6:3100; Grievance Procedure - Fairness as Jurisdictional Basis 4:2300; Interpretation - Reasonableness 4:2100; Promotion, Demotion and Transfer - Reasonableness 6:3100, Skill and Ability - Criteria of Ability and Qualifications 6:3300.

Circumstances: The union alleged that after accepting a two year deferral of his tenure application on the advice of the employer, the grievor was improperly denied tenure through unfair and unreasonable treatment. However, both parties agreed that correct procedures were complied with. The employer argued that the grievor did not have a strong enough record in two areas of qualification needed for the awarding of tenure (i.e, publication and independent research/research support), and so was denied.

Award: The grievance succeeds and tenure is granted because the employer's judgement in the case was found to be unreasonable and improper. In reaching its original decision, the employer had relied upon a negative minority view which it was not entitled to do under the terms of the collective agreement. Tenure itself was found to address the issue of the applicant's promise, while promotion addresses achievement - and the employer was found to have confused the criteria used for each in making its decision on the tenure matter.

Authority: Re Association of Professors of the University of Ottawa and University of Ottawa et. al. (1978), 84 D.L.R. (3d)576.

DECISION: 86-117

The Department of Transportation AND Canadian Union of Public Employees, Local 1867

Milton J. Veniot, Chairman; Rene Quigley, Gregory I. North

Blaise MacDonald, for the Union
Bruce E. Davidson, for the Employer
November 25, 1986

Issue: Skill and Ability 6:3000, Criteria of Ability and Qualifications - Examinations and Tests 6:3340, Requirements of the Job 6:3100; Fairness - Job Posting 6:2310, 5:2300; Remedies-Authority to Award - Retaining Jurisdiction 2:1400; Seniority 6:0000; Bargaining Unit - Vacancy 5:2520; Management Rights 4:2300; Job Posting - Vacancy 5:2510, 5:2520.

Circumstances: The grievor filed two grievances. The first concerned the filling of a job vacancy with an applicant from outside of the bargaining unit. The grievor maintained that he was fully qualified for the position, and had the most seniority of all candidates. The employer contended that the grievor was not the "best man" for the appointment based on testing. The second grievance was filed because a second job was posted and then the vacancy withdrawn. The grievor contended that if the position were to be filled, he again had the best qualifications and seniority for the position. The employer replied that the posting was withdrawn due only to financial cutbacks.

Award: The first grievance succeeds. The testing process was found to have been unfairly and improperly applied. The grievor was denied his rights because under the new collective agreement, all due consideration in appointments should be given to qualified members of the bargaining unit. The board reserved jurisdiction on the remedy for this grievance. The second grievance was denied. The employer is not required to fill a position for which adequate money or work does not exist.

Dissent: (North) The first grievance should be denied. The grievor was found to be only marginally qualified, as defined by the collective agreement. The test was found to be fairly administered under the terms of the agreement. For the second grievance, the finding concurs with the majority opinion.

Authorities: Dwyer, Greer and Edwards (Nova Scotia, unreported) Outhouse, Chairman (Hebert, dissent) February 13, 1986; Brown and Beatty 2nd ed. p.312, 261; Re Board of School Trustees of School District No. 68 (Nanaimo) and Canadian Union of Public Employees Local 606 (1985), 19 L.A.C. (3d) 176 (Germanine) p.183; Canadian Union of Public Employees, Local 1867 and Department of Transportation (May 17, 1983) (Outhouse, Chairman), p.4; International Nickel Company of Canada Ltd. and United Steelworkers, Local 6500 (Simmons) (1975) 9 L.A.C. (2d) 83; Tidewater Oil Company (Canada) Ltd. (1963) 14 L.A.C. 233 (Reville).

DECISION: 86-117a

Award Remedy

The Department of Transportation AND Canadian Union of Public Employees, Local 1867

Milton J. Veniot, Chairman; Gregory I. North, Rene Quigley

Johnathan Davies, for the Employer
Susan Coen, for the Union
March 16, 1988

Issues: Remedies - Authority to Award 2:1400; Skill and Ability 6:3000, Criteria of Abiltiy and Qualifications - Examination and Tests 6:3340; Vacancy 5:2510, - Job Posting 5:2520; Job Posting 5:2520.

Circumstances: The grievor was tested on equipment for a particular position and was found by the Employer not to be the best person for the job in question. The union maintains that the testing was done in an unfair manner. The original arbitration allowed the grievance, but reserved jurisdiction on the remedy. The union asked for lost wages and benefits from the time the grievor would have held the position if the testing had been done properly. The union also claims a seniority award. The employer maintains the original award means the grievor should be retested for the position, and if found successful, offered the position.

Award: The grievances fails. The board cannot allow a seniority award or a compensation award. It was decided that the employee presently performing the job in question would be bumped in seniority, and would probably loose his job. As a result the seniority system currently in place would suffer.

DECISION: 86-118

Colchester - East Hants District School Board AND Canadian Union of Public Employees, Local 1047 C.L.C.

Bruce Outhouse, Chairman; Charles Weir, David Gruchy

Richard Fogarty, for the Union
James Leefe, for the Employer
November 28, 1986

Issue: Arbitrability - Oral Agreements 2:1200; Collective Agreement - Matters Arising Outside of 2:1200; Interpretation-

Words and Phrases - Collective Agreement 4:1100; Wages-Withholding Wages 8:1420

Circumstances: The union filed a group grievance on behalf of the bus drivers in the bargaining unit. The union argued that the employer failed to pay for work performed covered by a verbal back-to-work agreement following a brief strike. The employer claimed that no such verbal agreement was made, and that the board has no jurisdiction to enforce verbal agreements, only written ones. In addition, the employer argued that if a verbal agreement did exist, it would not have applied to the situation under grievance because the union did not accept the initial settlement offer. The employer acknowledged that the drivers did work on the day in question, but that the employer is not responsible to pay since the drivers were just preparing the buses for work the following day.

Award: The grievance succeeds in part. The employer is required to pay the drivers, although the board accepts the employer's point that it has no jurisdiction over verbal agreements. However, the fact that the work performed benefitted the employer obligates the employer to compensate the drivers for the work performed. The board retains jurisdiction if the parties are unable to resolve the issue of compensation.

Authorities: Trade Union Act, S.N.S. 1972, c.19, as amended, section 1 (1) (e).

DECISION: 86-119

Seaview Manor Corporation AND Canadian Union of Public Employees, Local 2094

Bruce Outhouse, Arbitrator

Kevin MacNeil, for the Union
Reeves Matheson, for the Employer
December 1, 1986

Issue: Interpretation 4:2100; Promotion, Demotion and Transfer-Demotion or Transfer - Defined 6:2100, Promotion Defined 6:2100, Vacancy 5:2510; Seniority - Applications -Promotion, Demotion and Transfer 6:2100; Skill and Ability 6:3000, Arbitral Review 6:3100, Senior Employee if Relatively Equal 6:3220, Senior Employee with Required Ability 6:3210, Criteria of Ability and Qualifications 6:3300.

Circumstances: The grievor alleged that a vacant position was filled by a candidate with less seniority than the grievor, thus violating two sections of the collective agreement. The employer argued that while the grievor had more seniority, no breach of

the agreement occurred. The employer asserted that the successful candidate had scored higher in the interviewing and testing process and therefore was the best candidate for the position, despite having less seniority.

Award; The grievance succeeds in part and the employer is ordered to repost the position and conduct a new competition. The arbitrator found that the two sections of the collective agreement under which the grievance was filed are conflicting in terms of assessing seniority. This grievance is viewed as a transfer rather than as a promotion, and therefore seniority and qualifications issues must be reconsidered in making the appointment. The arbitrator has not made a finding as to whether or not the grievor is qualified for the job.

Authorities: Brown and Beatty. Canadian Labour Arbitration (2nd. ed.), pp.195-196; Re Canadian Union of Public Employees, Local 1523 and Cumberland District School Board (April 24, 1986), unreported, pp.13-14.

DECISION: 86-120

Civil Service Commission AND Nova Scotia Government Employees Union

S.Bruce Outhouse, Arbitrator

Ronald A. Pink, for the Union
Alison Scott, for the Employer
November 20, 1986

Issue: Resignation 7:7100, Intention 7:7100; Termination-Resignation 7:7100; Insurance and Welfare Plans - Entitlement to Benefits 8:3320, 4:2100; Illness or Disability - Employer Response - Inability to Work Properly 7:3220, Return to Work 7:3210, 8:3340; Evidence - Burden of Proof - Applications-Illness 7:3240; Leave of Absence 7:3120, Medical 7:3240.

Circumstances: The union alleges a violation of the collective agreement because the grievor was dismissed without just and sufficient cause. Although the grievor had resigned from his position, he reconsidered and tried to withdraw the resignation the next day. The grievor asks for reinstatement and full compensation. The employer rejects the allegation that the grievor was dismissed, and maintains that he voluntarily resigned without provocation or coercion from the employer. The employer maintains there was no breach of the collective agreement, the resignation should stand, and the grievance be dismissed.

Award: The grievance succeeds and the grievor is reinstated to his former position. The grievor was found to have shown

"insufficient objective conduct ...to manifest a continuing intent to resign". The employer acted too quickly when accepting the resignation, which had been tendered by the grievor under stressful conditions. Compensation consists of sick leave for the period the grievor was under doctor's care. The remaining time is to be treated as unpaid leave.

Authorities: Brown and Beatty. Canadian Labour Arbitration (2nd ed.) pp.513-514; Re University of Guelph and C.U.P.E., Local 1334 (1973), 2 L.A.C. (2d) 351 (Shime); Re Metropolitant Board of Commissioners of Police and Metropolitan Police Association (1978), 18 L.A.C. (2d) (Adams); Cocoa-Cola Limited and United Brewery Workers (1980), 26 L.A.C. (2d) 354 (Beck); Re Charles Wilson Limited and United Brewery Workers (1981), 29 L.A.C. (2d) 233 (Betcherman); Re Mack Canada Inc. and International Association of Machinists and Aerospace Workers, Lodge 2281 (1982), 3 L.A.C. (3d) 320 (Kennedy); Re N.S.G.E.U. on behalf of Paula MacDonald and Civil Service Commission (December 18, 1981), unreported (Outhouse); Re Government of British Columbia and British Columbia Government Employees Union (1977), 17 L.A.C. (2d) 42 (Bird); Re Head and Commissioner of Ontario Provincial Police (1981), 127 D.L.R. (3d) 366 (aff'd by the Supreme Court of Canada {1985}, 16 D.L.R. {4th} 768).

DECISION: 86-121

Municipal Ready-Mix Limited AND Labourer's International Union, Local 1115

David J. MacDonald, Arbitrator

Frank Elman, for the Union
J. Bernard Boudreau, for the Employer
nd.

Issue: Seniority 6:0000, Acquisition 6:1100, Non-Working Periods 6:1110, Applications 6:2000, Recall 6:2354; Estoppel 2:2200, 2:2220, Delay in Complaining or Grieving 2:3210.

Circumstances: The grievor alleged that the employer failed to recognize his seniority when another employee was rehired before the grievor after a normal seasonal layoff. The employer contended that there was no breach of the collective agreement since both employees had the same amount of seniority, both having been hired on the same day. When rehiring, ability was not considered an issue; instead, only the location of the work in relation to the employees' homes, and how well they would work with others were taken into account. The union argued that the employer was not consistent with regard to this rehiring practice. As no one has complained before the employer relied on the doctrine of equitable estoppel.

Award: The grievance succeeds. On the issue of seniority the arbitrator rejected the employer's position concerning a common hiring date, asserting that it contradicts the principles of seniority. The collective agreement does not include provisions to limit rehiring based on geography or work groups. Past practice evidence was found not applicable. The arbitrator relied on common law principles to award damages since the collective agreement was silent on the issue. The employer was directed to reimburse the grievor for lost work opportunities. Jurisdiction is retained if remuneration cannot be agreed upon by the parties.

Authorities: Brown and Beatty. Canadian Labour Arbitration 2nd. ed. p.263, 86; Hawker Siddley Canada Inc. Trenton Works Division v. U.S.W.A., Local 1231 July 14, 1983 (Nathanson).

DECISION: 86-122

Northside-Victoria District School Board AND Canadian Union of Public Employees, Local 981

Frank L. Elman, Arbitrator

Kevin MacNeil, for the Union
David Ryan, for the Employer
November 28, 1986

Issue: Time Limits - Delay 2:3210, Mandatory or Directory 2:3128.

Circumstances: The grievor was given a notice of suspension following sick leave for an incident that occurred before the sick leave was taken. The union contends that notice for the suspension should have been given directly after the incident, thus resulting in the grievor's loss of five sick days instead of five work days. The grievor argues that the delay in notification of his suspension is contrary to the collective agreement. The employer asserts that it has complied with the time limits for such action and that it agreed to wait until the grievor returned from sick leave before imposing discipline.

Award: The grievance fails. The collective agreement lacks mandatory requirements for time limits. It is merely directive. The employer is seen to be within these directive guidelines. The grievor was disciplined when he returned to work as allowed under the terms of the collective agreement.

Authorities: Re Mirador Motor Inn and Hotels, Clubs Restaurants, Taverns, Employee's Union Local 261 (1973) 2 L.A.C. (2d) 339; Canadian Airline Employees Association and Haley v. Eastern Provincial Airways (1963) Limited 49 N.S.R. (2d) 28; Re Dominion

Consolidated Truck Lines Limited and Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union 141 (1976) 60 D.L.R. (3d) 37

DECISION: 86-123

Grace Maternity Hospital AND Canadian Brotherhood of Railway, Transport, and General Workers, Local 606

Eric G. DeMont, Arbitrator

Ronald Pink, for the Union
Laurie Sayer-Smith, for the Employer
December 11, 1986

Issue: Seniority - Applications 6:2000, 6:2100; Skill and Ability 6:3000, Arbitral Review 6:3100, Criteria of Ability and Qualifications 6:3300; Job Posting 5:2520, 6:2310; Fairness-Vacancy -Filling 6:3000; Good Faith - Vacancies, Transfers, Promotions 5:2300.

Circumstances: The grievor alleges that a posted position was awarded to an applicant with less seniority. The union argues that the job posting did not state that specific skills or abilities were necessary to perform the job. As well, they contend that the employer did not make reasonable attempts to determine if the grievor had the skills the employer now holds are required for the position. The grievor wants the job awarded to her. The employer states that the successful applicant has superior interpersonal skills and past experience. The employer argues that the grievor should have proven her skill and ability to be equal to that of the successful applicant and that its decision was made in good faith.

Award: The grievance succeeds in part. The employer has the right to select the applicant with the best skills since this is an important, though unstated, aspect of the job. However, the employer is seen to have acted unfairly in determining the ability and skill criteria during the applicants' interviews. The employer is instructed to repost the position and reconsider all applicants, and that interviews should be done by a new selection committee. Jurisdiction is retained for any technical or administrative problems that may arise from the new selection committee.

Authorities: Re: Dominion Stores Ltd. 15 L.A.C. (2d) 403 (Shime); Brown and Beatty. Canadian Labour Arbitration 2nd. ed. pp.298, 316.

DECISION: 86-124

The Cheticamp Fishermen's Co-Operative Society of Cheticamp, N.S. AND Canadian Brotherhood of Railway, Transport and General Workers

Frank L. Elman, Arbitrator

Victor Tomiczek, for the Union
Tim Britton, for the Employer
November 28, 1986

Issue: Overtime - Distribution of Overtime - Equitable Distribution 5:3224, Seniority 5:3222, Remedies 5:3240; Interpretation 4:2000, Intention of the Parties 4:2300, Past Practice 2:2220.

Circumstances: The grievor argues a breach of the collective agreement occurred when the employer hired junior employees instead of the grievor for overtime work. Past practice was to allot overtime to day workers willing to work on the night shift. The employer maintains that as a result of an efficiency study that monitored the productivity of workers, the employer elected to give overtime based on ability and work performance. The employer notified the union of this new practice after it had already awarded overtime to the junior employees.

Award: The grievance succeeds. The employer has violated the terms of the collective agreement by electing to adhere to the recommendations of an efficiency study and awarding overtime on the basis of ability and work performance. The intent of the agreement was to use seniority as the criterion. The grievor is awarded compensation for overtime work which was given to a junior employee.

Authorities: Brown and Beatty Canadian Labour Arbitration 2nd. ed., p. 190

DECISION: 86-125

Yarmouth Regional Hospital AND Canadian Union of Public Employees, Local 835

Peter E. Darby, Arbitrator

Hugh Lennon, for the Union
Laurie Sayer-Smith, for the Employer
December 5, 1986

Issue: Management Rights 4:2300, 5:0000, Classification 5:2200; Time Limits - Continuing Grievance 2:3128; Wages - Change in Job Function 5:2410, Management Rights 8:1400.

Circumstances: A grievance is filed on behalf of two workers who claim that the employer has not paid them at the rate of pay established in the collective agreement for the job classification they have been told they hold. The employer contends that the job held by one grievor since 1977 was never posted and that the grievor was 'transferred' to another division - not requiring notification to the union or a re-classification of the grievor's position. The employer maintains that the grievor is confused about her status based on a clerical error which occurred when payroll records were automated. This confusion was reinforced when the second grievor was hired at the same pay rate.

Award: The grievance fails. There was never a job posting in 1977 for the first grievor and the position whose classification was in question. The grievors were hired under a classification that had a lower rate of pay, and the grievor was then transferred, as was the employer's right. Clerical error led to a misunderstanding of her proper classification. The employer is in error by not insisting that managerial personnel refer to staff positions by their proper classifications since not doing so has perpetuated a sense of injustice for the two grievors.

Authorities: U.A.W. L.240, in re Ford Motor Company of Canada Limited [Case 3] p.3; Brown and Beatty. Canadian Labour Arbitration 2nd. ed., p.539.

DECISION: 86-126

Aberdeen Hospital Commission AND Aberdeen Local of the Nova Scotia Nurses' Union

Bruce Outhouse, Chairman, John D'Orsay, John Plowman

John MacEwan, for the Union
Brian Johnston, for the Employer
December 3, 1986

Issue: Discipline and Discharge - Work Performance - Isolated Occurrence 7:3542, Grounds for - Fighting or Threatening 7:3430; Disciplinary Penalties - Mitigating Factors 7:4400; Evidence 3:3000, Exclusionary Rules 3:4300, Hearsay 3:4310; Grievance Procedure - Compliance with 7:2100, Failure to Reply 2:3128; Grievance - Continuing Grievance 2:3128.

Circumstances: The union alleges that the employer violated the collective agreement by disciplining the grievor without cause. The grievor claims to have initially presented her grievance to the shift supervisor and then submitted a written grievance. At that point she was told the grievance was premature since the

matter was still under investigation. The grievor asks for reinstatement with full compensation. The employer maintains the grievor was guilty of misconduct and therefore discipline was justified. It also claims the grievor never actually grieved the discipline in question. The grievance was filed for an indefinite suspension but, in fact, only a one day suspension was imposed.

Award: The Board finds that they have jurisdiction to hear the case. The union's position that the grievance was ongoing and the fact that they repeatedly asked the employer for a response, indicate that the earlier grievance was still outstanding. It was not necessary to file a second grievance.

The grievance fails. The Board has some reservations about its decision but finds that the employer's allegations of misconduct are probable in this situation. The decision is based upon a "dispassionate review of the material evidence", and not the evidence of witnesses or hearsay evidence. The employer is directed to remove the disciplinary letter from the grievor's file and to substitute a copy of the award.

Dissent: (D'Orsay, January 16, 1987) He agrees with the union and majority opinion concerning jurisdiction. However, he finds the grievance to succeed based on evidence presented by the grievor and her co-worker rather than upon evidence given by a patient in the ward.

Authorities: Re Baptist Housing Society (Grandview Towers) and Hospital Employees' Union, Local 180 (1982), 6 L.A.C. (3d) 430 (Greyell); Re The Board of Management of Kings Regional Health and Rehabilitation Centre and Canadian Union of Public Employees, Local 1472 (January 15, 1985), unreported (MacLellan); Re Digby Town and Municipal Housing Corporation (Tideview Terrace) and Service Employees' International Union, Local 902 (June 14, 1985), unreported (MacLellan); Re Government of the Province of British Columbia and British Columbia Government Employees' Union (1980), 26 L.A.C. (2d) (Hope); Re Ontario Jockey Club and Restaurant, Cafeteria and Tavern Employees Union, Local 254 (1977), 15 L.A.C. (2d) 273 (Schiff); Re Corporation of County of Norfolk and Building Service Workers' Union, Local 220 (1973), 4 L.A.C. (2d) 108 (Hanrahan); Re Girvin et. al. and Consumers' Gas Co. (1973), 40 D.L.R. (3d) 509 (Ont. H.C.); Re Hillsdale Nursing Home and Boot and Shoeworkers' Union (1978), 19 L.A.C. (2d) 81 (Bruner)

Dissent: Sheraton Ltd v Hotel and Club Employees Union Local 299 (26 L.A.C. 2d 122); Government of the Province of Alberta v Alberta Union of Provincial Employees 8 L.A.C. (3d) 1; R. v Baskerville, [1962] 2 K.B. 658, p.667, 12 Cr. App. R. 81; Hubin v. The King [1927] 4 D.L.R. 760. [1927] S.C.R. 442, 48 C.C.C. 172; Thomas v The Queen [1952] 4 D.L.R. 306, [1952] 2 S.C.R. 344, 113 C.C.C. 193, 15 C.R. 1; Hay et al v Bain (1925) 2 D.L.R. 948;

Moore on Facts 1908 v. II, para. 783.

DECISION: 86-127

Nova Scotia Government Employees Union AND Civil Service Commission

S. Bruce Outhouse, Arbitrator

Ronald A. Pink, Kimberley Turner, for the union
Reinhold M. Endres, for the employer
December 10, 1986

Issues: Arbitrability - Procedural limitations - Policy and individual grievances 2:3120, 2:3124; Grievance - Consolidation and severance of grievances 3:3100, Employee grievance 2:3120; Policy grievance - Nature of 2:3124; Job classifications and descriptions - Creation or revision 5:2000; Bona fides 5:2300, Wage structure 5:2400, 5:2420; Management rights - Classification 4:2310, 5:2200; Wage rate for new classification 8:1000; Wages-Rates for new and revised classifications 8:1000

Circumstances: Pursuant to an order of the Civil Service Employee Relations Board, the grievor was included in the bargaining unit. A dispute arose to her proper classification and rate of pay. The Union argued the Employer had unilaterally created a new classification and added the collective agreement without negotiating with the union or obtaining its consent. The grievor also began a claim based on misclassification. In an interim award, the arbitrator ruled that the grievance was of a hybrid nature, having direct impact on the grievor but also being of general concern to the union.

The Employer did not agree to a consolidation of the grievances. It conceded that while it had the right to create new classifications, it was obliged to negotiate the rates of pay for such new classifications. The Employer argued that, the policy grievance being disposed of the individual grievance would have to wait for a separate hearing. The Union moved for consolidation. The arbitrator denied this motion as both parties did not agree on consolidation. However, the arbitrator ruled that effective settlement of the policy grievance required disposition of ancillary matters, including the individual grievance.

Award: The grievance is dismissed. The arbitrator is satisfied that the grievor's job is unique and that therefore the Employer was justified in creating a new classification for it. The onus is then on the union to show that the rate of pay attached to the position is unreasonable; this onus was not discharged. The arbitrator comments on management's rights to create a new

position, and on the establishment of appropriate rates of pay.

Authorities: Re Windsor Public Utilities Commission and International Brotherhood of Electrical Workers, Local 911 (1974), F.L.A.C. (2d) 380 (Adams); Re Nurses Assoc. Joseph Brant Memorial Hospital and Joseph Brant Memorial Hospital (1972), 24 L.A.C. (2d) 104 (Hinnegan); Re British Columbia Forest Products Limited and Pulp, Paper and Woodworkers of Canada, Local 2 (1978), 20 L.A.C. (2d) 104 (Hope); Brown and Beatty, Canadian Labour Arbitration (2nd ed.) pp. 117-118

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PART 4

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